

# Foreword

## From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization

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The Reagan Administration's aggressive efforts to deregulate the national economy touched off a sharp debate over the proper relationship between the White House and the federal bureaucracy—and that debate continues to this day. Peter Strauss's foreword<sup>1</sup> last year directly joined it by setting forth an elegant and incisive critique of the notion that the President should be empowered to act as if he is the regulatory "decider" in chief.<sup>2</sup> But as persuasive as that critique is, I want to focus on the important legal questions that come to the fore once we move beyond the now nearly thirty-year-old controversy surrounding the President's attempts to order administrative agencies to comply with his preferred policy prescriptions.

Professor Strauss's critique took direct aim at White House efforts to countermand federal administrative agency judgments—

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<sup>1</sup> Peter L. Strauss, *Overseer, or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696 (2007).

<sup>2</sup> *See id.* at 698, 704–05.

whether by rejecting proposed actions or mandating new ones.<sup>3</sup> In doing so, Strauss implied that, absent such aggressive presidential interference, the national bureaucracy would be well positioned to offer a countervailing perspective, presumably rooted in norms of expertise and professionalism.<sup>4</sup> Significantly, defenders of the President's right to veto and direct agency decisions have usually operated from a similar premise. They have argued that such presidential authority, aggressive though it is, is necessary to make the regulatory system democratically accountable and administratively coherent.<sup>5</sup> But they, too, have assumed that, if left to their own devices, agencies would serve as a substantial counterweight to the White House. Indeed, that is precisely the problem that, in their view, needs to be overcome.<sup>6</sup> Both advocates of presidential control and defenders of agency autonomy thus seem to agree on the key question going forward: whether the President should be permitted to mount a hostile takeover of a bureaucracy that is otherwise substantially independent?

In making this question central, each side has essentially ignored the fact that for the last three decades, Presidents have been doing much more than looking for ways to wrest discretionary decisionmaking power *from* agencies. Over that same period of time, Presidents also have been making novel and aggressive use of their powers of appointment to remake agencies in their own image.<sup>7</sup> As a result, agencies increasingly *want* to align their own judgments with the White House view—even if top agency officials are not ordered to do so by the political aides working at 1600 Pennsylvania Avenue. Agencies are now to an unprecedented extent governed by a thick cadre of political appointees; these individuals have been chosen either for having close ties to the President or for making strong prior commitments to his regulatory vision.<sup>8</sup> For all the debate over the legality of a White House hostile takeover, therefore, the real story may be that Presidents have effected a peaceful merger with the federal bureaucracy by transforming the nation's administrative agencies from within.

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<sup>3</sup> See *id.* at 732–38.

<sup>4</sup> See *id.* at 756–57.

<sup>5</sup> See, e.g., Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2331–46 (2001).

<sup>6</sup> See *id.* at 2315–16.

<sup>7</sup> See, e.g., *id.* at 2277.

<sup>8</sup> See David E. Lewis, *Patronage, Policy, and Politics in Presidential Appointments* 4, 10, 13, 16–18 (Apr. 2007) (unpublished paper, available at <http://www.princeton.edu/~delewis/Papers/Midwest2007.pdf>).

This development suggests that—interesting though the legal questions associated with various forms of external White House regulatory control may be—it is critical to examine the consequences of the politicization of the national bureaucracy itself. Refocusing discussion along these lines reveals a host of distinct legal issues, some of which are presented by the Court’s recent landmark decision in *Massachusetts v. EPA*<sup>9</sup> and its aftermath. In that case, the Court held that the Environmental Protection Agency unlawfully refused to initiate a rulemaking to restrict the emission of greenhouse gases.<sup>10</sup> The Court concluded that the Agency had acted arbitrarily when, in justifying its own inaction, the Agency relied almost entirely on the White House’s previously announced global warming policy.<sup>11</sup> Important as this ruling is, however, it ultimately reveals the difficulty that judges face in trying to combat agency politicization by forcing agencies to act independently. For that reason, the case illustrates the need to consider alternative responses to the consequences of presidential use of the appointment power as a means of reducing the likelihood of agency resistance.

Here, too, the decision in *Massachusetts v. EPA*—as well as the various regulatory actions that have been taken in its wake—is of interest. In affirming states’ standing to challenge federal agency inaction,<sup>12</sup> the Court’s decision can be read to suggest that state and local regulatory competition may provide an important check on the White House’s attempt to monopolize regulatory policy. State and local regulators are, by definition, beyond the power of the White House to appoint, and they are thus uniquely capable of functioning as surrogates for the independent federal administrative voice that modern presidential staffing practices have sought to tamp down. Of course, the fact that state and local governments have been asserting their own regulatory authority of late does not mean that federal regulators have been indifferent to what they have been doing. The upsurge in state and local regulatory activity with respect to global warming, for example, has prompted federal agency officials to assert the regulatory power to preempt these competing efforts.<sup>13</sup> And this dynamic

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<sup>9</sup> *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007).

<sup>10</sup> *Id.* at 1463.

<sup>11</sup> *Id.* at 1462–63.

<sup>12</sup> *Id.* at 1458.

<sup>13</sup> See William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. REV. 1547, 1616–17 (2007) (evaluating the Department of Homeland Security’s assertion that federal greenhouse gas legislation would preempt state and local authorities); J.R. DeShazo & Jody Freeman, *Timing and Form of Federal Regulation: The Case*

has been replicated in other policy contexts as well. Thus, the debate over federal agencies' power to determine the preemptive reach of federal law may be as critical to the preservation of an independent administrative perspective as is the more familiar debate over the authority of the President to override federal agency judgments.

I conclude by addressing some of the conceptual issues that arise from linking restrictions on regulatory preemption to responses to the politicization of federal agencies. Whether such a linkage makes sense depends, of course, on why politicization should be of concern. If the problem is solely that politics is trumping professionalism and scientific expertise, then it is not clear that decentralization *is* an appropriate response. State and local regulators are hardly more blessed with technical capacity than federal ones, and they too may be subject to political controls.

But although the commitment to expert, scientific truth-seeking has long been a powerful component of the administrative ideal, so too is the commitment to experimentation and social learning, rooted in doubt about there being "right" answers in a rapidly changing world in which partial knowledge of actual conditions is the most that one can expect to obtain. Indeed, this strain of thought, reflecting as it does the contemporary acceptance of uncertainty and disagreement, has become increasingly influential. The modern reformation of administrative law sought to ensure greater participation by interest groups in the policymaking process,<sup>14</sup> while more recent variants have gone even further, as exemplified by the new governance paradigm's embrace of regulatory negotiation, input from "stakeholders," and broad community participation. These approaches indicate that the administrative process, to be useful in the current world, must do more than clear a space for the unbiased, technical super expert to work his magic. It must provide a mechanism for generating creative solutions to complex and ever-changing problems. By reducing the chance that the national administrative process itself will produce unexpected discoveries, unintended outcomes, and unimagined compromises, politicization threatens to render predictable and foreordained what otherwise might be unsettling and innovative. And so, in this respect, decentralization is most definitely responsive to the concerns raised by politicization; it seeks to preserve the more hetero-

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*of Climate Change*, 155 U. PA. L. REV. 1499, 1504–11 (2007) (describing defensive preemption as the result of state regulation inducing industry demand).

<sup>14</sup> See generally Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669 (1975).

geneous approach to policy formulation that many have long looked to a relatively independent national administrative process to provide.

*I. Moving Beyond Formal Independence: Centralization and Politicization*

Controversies over presidential control present a basic conceptual choice. There are agencies, and there is a White House. Are they to be one and the same—a monolith in which the agencies do the bidding of the President? Or are they to be separate—a federal executive of functional specialization that permits norms of expertise, professionalism, and the rule of law to operate within agencies free from the influence of presidential policy preferences?

Some ways of framing this choice make the bureaucracy sound attractive; others make it less so. One formulation presents the choice as between a hidebound, small “c” conservative bureaucracy that is slow to act and a vigorous White House that is full of energy and eager to innovate.<sup>15</sup> Another distinguishes between an unaccountable and headless mass of bureaus and a politically responsive President.<sup>16</sup> Still others depict a captured, faction-ridden agency and a White House that is intent on serving the interests of the nation as a whole,<sup>17</sup> or, alternatively, a crassly political White House vying with professional and expertise-driven regulators.<sup>18</sup> A final one offers an even starker frame: it is the difference between a government of law (as embodied by the statutorily created agencies) or one of men (as represented by the unfettered personal discretion of the President and his closest aides).<sup>19</sup>

For present purposes, the descriptive accuracy of these formulations matters less than the assumption that they share—namely, that White House and agency perspectives will naturally diverge. There are indications that those responsible for establishing the Constitution had a fairly restricted view of the extent to which departmental of-

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<sup>15</sup> See, e.g., *id.* at 2339 (arguing that the President “can act without the indecision and inefficiency that so often characterize the behavior of collective entities”).

<sup>16</sup> See, e.g., Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 490 (2003) (describing the view that presidential control ensures that agencies are responsive to the public); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1248–49 (1994).

<sup>17</sup> See Kagan, *supra* note 5, at 2358–61.

<sup>18</sup> Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise* 3–10 (Aug. 2007) (unpublished manuscript, available at <http://ssrn.com/abstract=1008906>) (setting forth, though not endorsing, this position).

<sup>19</sup> See Strauss, *supra* note 1, at 712–13.

ficers were properly considered mere alter egos of the President.<sup>20</sup> In other words, they too seemed to accept a certain degree of functional separation within the executive. Much later, the prospect of this divergence between the President's men and the agencies framed the fight over congressionally mandating formal agency independence.<sup>21</sup> Should there be a statutorily insulated civil service? Should agency heads serve at the pleasure of the President, or should they be removable, as a matter of law, only for cause? Should agencies be run by a single departmental head, or rather by a commission with staggered terms, and perhaps even statutory requirements of bipartisanship?

In the period from roughly the Progressive Era through the early New Deal, it was well understood that agencies were not foreordained to use a distinct approach to making regulatory policy. The choice between these alternative ways of structuring the bureaucracy turned on precisely whether one believed that agencies *should be constituted* to ensure they would develop an autonomous administrative culture—a culture that would be notably different from that prevailing in the more politically oriented White House offices or congressional corridors.

As it turned out, the argument for administrative independence was widely embraced at the time—albeit within limits.<sup>22</sup> And although the modern regulatory state has more than its share of critics, administrative independence retains its grip.<sup>23</sup> There seems to be relatively broad agreement, for example, that a competitively chosen civil

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<sup>20</sup> See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 165–66 (1803) (distinguishing between these two types of officers); see also Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 2 (1994) (“We think that the view that the framers constitutionalized anything like [the unitary executive] is just plain myth.”); Strauss, *supra* note 1, at 708–09 (discussing the distinction drawn in *Marbury*).

<sup>21</sup> Cf. Paul R. Verkuil, *The Purposes and Limits of Independent Agencies*, 1988 DUKE L.J. 257, 257–58 (describing tension between the Roosevelt Administration and congressional creation of independent agencies).

<sup>22</sup> The Brownlow Commission made the case for greater presidential control, proposing to reorganize the independent agencies to place them under the direct control of the President. The proposal foundered on a wave of public hostility to the idea. Only its proposal to create an Executive Office of the President, which would assist the President in overseeing a bureaucracy that would, in important respects, retain its formal independence, was adopted. See PAUL C. LIGHT, THICKENING GOVERNMENT: FEDERAL HIERARCHY AND THE DIFFUSION OF ACCOUNTABILITY 37–38 (1995).

<sup>23</sup> See Paul R. Verkuil, *Separation of Powers, the Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 324–26 (1989) (noting that “the idea of independence clashes with equally compelling notions of branch accountability under the separation of powers doctrine”).

service is preferable to a spoils system.<sup>24</sup> In addition, “for cause” removal requirements are no longer the source of controversy that they once were.<sup>25</sup>

This consensus has solidified even as formal guarantees of statutory independence now seem less significant than they once did. It has become clear, for example, that even an unrestricted removal power is costly to exercise.<sup>26</sup> Similarly, it is well known that even nominally independent agencies are hardly immune from White House influence.<sup>27</sup> There is a real difference between a Federal Communications Commission run by Reed Hundt and one run by Michael Powell. That neither served at the pleasure of the President did not preclude the nation’s Chief Executive Officer from shaping the direction of federal communications regulatory policy.

That said, no one doubts that statutorily created grants of independence have some meaningful effect; by and large, that effect is tolerated—even embraced—as an integral part of the national regulatory system.<sup>28</sup> Moreover, administrative independence remains a powerful value even with respect to those agencies that do not enjoy formal insulation from the President’s removal authority. Whether rooted in respect for rule of law norms, faith in the idea of expertise, a commitment to the virtues of professional competence relative to short-term political calculation, or even an attraction to a more pluralist approach to policymaking, the notion that all administrative agencies are supposed to make their own judgments—free from White

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<sup>24</sup> See, e.g., PAUL R. VERKUIL, *OUTSOURCING SOVEREIGNTY: WHY PRIVATIZATION OF GOVERNMENT FUNCTIONS THREATENS DEMOCRACY AND WHAT WE CAN DO ABOUT IT* 65–69 (2007).

<sup>25</sup> But see Neal Devins, *Political Will and the Unitary Executive: What Makes an Independent Agency Independent?*, 15 *CARDOZO L. REV.* 273, 278 (1993) (describing for-cause removal as controversial because it “encourages agency heads to . . . engage in policy disputes with the White House”).

<sup>26</sup> See, e.g., Kagan, *supra* note 5, at 2274.

<sup>27</sup> See *id.* at 2288.

<sup>28</sup> Indeed, the last major court contest to address the issue reflects this reality. In *Morrison v. Olson*, 487 U.S. 654, 691–93, 696 (1988), the Supreme Court upheld congressional action creating an independent counsel insulated from being removed at will. But the independent counsel’s office had no real administrative policymaking authority, and thus even if it had been struck down, the legal status of independent agencies more generally would not likely have been called into question. Nothing in the Court’s decision, moreover, substantially affected the basic constitutional settlement that had been reached in the wake of the decisions in *Myers v. United States*, 272 U.S. 52, 117–18 (1926) (affirming President’s removal authority), and *Humphrey’s Executor v. United States*, 295 U.S. 602, 631–32 (1935) (denying President’s removal authority over quasi-legislative executive branch officers).

House pressure—retains great power.<sup>29</sup> Thus, even though statutorily imposed removal restrictions and civil service protections no longer trigger much debate, the President's assertion of the power to exercise direct control over the bureaucracy's decisionmaking clearly does.

In a famous essay published in the midst of the Reagan Administration, the political scientist Terry Moe identified two important mechanisms—beyond the removal power—by which modern Presidents seek to gain (and may be expected to continue to seek to gain) control over the bureaucracy. Moe termed the first mechanism “centralization” and called the second one “politicization.”<sup>30</sup> It is common to conflate these two strategies and to describe both as if they are part and parcel of a comprehensive effort to “politicize” the bureaucracy. On this view, the term “politicization” refers to all presidential efforts to ensure that regulatory judgments are made in a way that will best serve the White House's short-term and politically inflected ends. But Moe had a different and much more limited idea of what “politicization” entailed. Moe made a point of disaggregating the ways in which the White House seeks to assert control over agencies, and he did so by sharply distinguishing between two distinct methods of doing so.<sup>31</sup>

Politicization for Moe, therefore, did not refer to the general project of ensuring that bureaucratic outputs are consonant with White House preferences. Politicization referred instead to White House efforts to populate the bureaucracy with politically responsive actors.<sup>32</sup> “Politicized agencies,” David Lewis succinctly explains, in following Moe, “are those that have the largest percentage and deepest penetration of appointees.”<sup>33</sup> By contrast, “centralization,” to continue with Moe's terminology, furthers the President's political aims in a very different way. Centralization involves efforts to shift policymaking power from the bureaucracy to the Executive Office of the President, which includes the mix of offices and aides that are housed mainly in the White House itself and the Old Executive Office Building.<sup>34</sup>

Thus, even though politicization and centralization share a common purpose, they function very differently. As a technique of control, politicization is actually rather deferential. It does not challenge

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<sup>29</sup> See Kagan, *supra* note 5, at 2555–56.

<sup>30</sup> Terry M. Moe, *The Politicized Presidency*, in *THE NEW DIRECTION IN AMERICAN POLITICS* 235, 244–45 (John E. Chubb & Paul E. Peterson eds., 1985).

<sup>31</sup> *Id.* at 244–45 (distinguishing between increasing White House organizational competence on the one hand and presidential appointment of agency officials on the other).

<sup>32</sup> *Id.* at 245.

<sup>33</sup> Lewis, *supra* note 8, at 3.

<sup>34</sup> See Moe, *supra* note 30, at 244–45.



the formal autonomy of agencies. It seeks only to ensure that administrative actors—no matter that they enjoy legal independence to some greater or lesser degree—share the President's goals. Centralization, by contrast, is a far more active strategy. It directly challenges the formal right of the bureaucracy to make its own judgments. It attempts to lodge the final regulatory decision in the President rather than the agencies.

This distinction might suggest that politicization is a less effective strategy of White House control. By declining to challenge the basic principal/agency decisionmaking structure, politicization necessarily entrusts final policymaking power to the bureaucracy. Because appointees, including seemingly loyal ones, can always disappoint, politicization carries substantial risk. By contrast, centralization directly gives the White House the power to tell agency officials what to do. Centralization therefore seems to leave less to chance because it restricts the scope of the independent discretion that agency officials possess.

Moe noted, however, that as a practical matter, centralization turns out to be very hard to implement. Presidents have only finite resources—in terms of time, energy, personnel, and political capital—to reorganize decisionmaking structures.<sup>35</sup> As big as the Executive Office of the President has now become, it cannot possibly be expanded to replicate the agencies themselves. And, of course, the bigger the White House regulatory apparatus gets, the more difficult it is to ensure that a coherent policy (and one plausibly consonant with the President's own desires) reaches down to the agencies.<sup>36</sup>

Politicization, by contrast, is comparatively less resource-intensive, and it may therefore prove to be a much easier strategy to implement. Moe explains why:

Congress tends to oppose presidential attempts to politicize the bureaucracy. But to the extent he has the freedom to move in this direction, the president will find politicization irresistible. The appointment power is simple, readily available, and enormously flexible. It assumes no sophisticated institutional designs and little ability to predict the future, and it is incremental in the extreme: in principle, each appointment is a separate action. Thus, while knowledge demands are not negligible—somehow, candidates must be recruited, evaluated, and the like—many mistakes can be corrected

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<sup>35</sup> *Id.* at 240–43.

<sup>36</sup> *Id.* at 246–63.

and adjustments can be made as the inevitably changing short-term pressures of presidential politics seem to require. By taking advantage of these attractive properties, the president is uniquely positioned to try to construct his own foundation for countering bureaucratic resistance, mobilizing bureaucratic competence, and integrating the disparate elements of his administration into a more coherent whole. Given his general lack of resources and options, these are enticing prospects indeed.<sup>37</sup>

As seemingly attractive as politicization is as a presidential strategy for gaining control, administrative law scholars have generally focused their attention on the legal questions that are raised by presidential efforts to centralize regulatory decisionmaking.<sup>38</sup> They often make passing reference to the fact that Presidents have been aggressively using their staffing authority to politicize the bureaucracy in recent times.<sup>39</sup> But no sooner do they mention this fact than they typically downplay its import.<sup>40</sup> After all, seemingly loyal appointees may resist the President because of their competing loyalties to other actors (be they congressional committee heads, regulated parties, or interest groups). Or civil servants may successfully push their own agenda as against the interests of the political staff within the agency. Accordingly, as some scholars suggest, presidential control over the bureaucracy is ultimately dependent on the Chief Executive's power to tell the bureaucracy what to do, notwithstanding his capacity to select who serves in it.<sup>41</sup> It may also be that, in the eyes of many administrative law scholars, the legal issues presented by staffing practices are neither as interesting nor substantial as those posed by presidential efforts to override autonomous agency judgments. The legal

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<sup>37</sup> *Id.* at 245.

<sup>38</sup> In addition to Peter Strauss's foreword last year, see, for example, Bressman, *supra* note 16, at 492–515; Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 CHI.-KENT L. REV. 987, 987–88 (1997); Kagan, *supra* note 5, at 2319–31; Peter L. Strauss, *Presidential Rulemaking*, 72 CHI.-KENT L. REV. 965, 967–68 (1997); cf. Christopher C. DeMuth & Douglas H. Ginsburg, Commentary, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1082–83 (1986); Alan B. Morrison, Commentary, *OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 HARV. L. REV. 1059, 1059 (1986).

<sup>39</sup> See, e.g., Kagan, *supra* note 5, at 2277. Similarly, Freeman and Vermeule acknowledge the important role of political appointees, but they ultimately conclude that the difference between centralization and politicization is much less significant when it comes to developing judicial strategies for promoting an autonomous administrative judgment than I do. See Freeman & Vermeule, *supra* note 18, at 5–6, 32, 35; *infra* Part IV.

<sup>40</sup> See, e.g., Bressman, *supra* note 16, at 506–08.

<sup>41</sup> See, e.g., Kagan, *supra* note 5, at 2285–91.

scholar's interest in law, therefore, may foreground centralization even though the real-world impact of politicization may be much greater. And so, in the conventional narrative, although Presidents have become more and more aggressive in attempting to overrule agencies, the bureaucracy is often portrayed as if it is still home to the relatively autonomous administrative culture that James Landis, among others, worked so hard to establish nearly a century ago.<sup>42</sup>

## II. Centralization

This background suggests that the legal debate over various presidential efforts to centralize regulatory decisionmaking—through the direct vetoing or ordering of agency action—presents a question of the greatest moment: whether an otherwise autonomous bureaucracy will be forced to become the handmaiden of the White House? Or, to use terms more congenial to defenders of White House control, whether unaccountable regulators will be permitted to evade political control?

In fact, however, presidential efforts to centralize regulatory policy have been relatively limited in scope. Insofar as Presidents have sought to gain greater control over the bureaucracy, therefore, it is hard to conclude that centralization has been their dominant strategy. For that reason, what Moe termed “politicization” also needs to be taken seriously; indeed, it needs to be made central to the way we think about the contemporary legal relationship between the President and the agency. Or so this Part argues.

### A. *A Counter-Bureaucracy?*

President Nixon pursued the most dramatic centralization effort of any modern Chief Executive. In doing so, the President initially refrained from attempting to politicize the bureaucracy to any great degree. Nixon largely ceded the appointment of subagency officers to his department heads, informing his cabinet officers at an early meeting that it would be up to them to choose their subordinates—a concession that he almost immediately described as a grievous mistake.<sup>43</sup> But in order to make up for the political appointing power that he had chosen to eschew, President Nixon simultaneously launched a major effort to augment the administrative decisionmaking capacity of the Executive Office of the President.<sup>44</sup>

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<sup>42</sup> See JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 111–16 (1938).

<sup>43</sup> RICHARD P. NATHAN, *THE ADMINISTRATIVE PRESIDENCY* 38–39 (1983).

<sup>44</sup> *Id.* at 34–38; Kagan, *supra* note 5, at 2275–76.

Richard Nathan, a Nixon aide, has usefully chronicled the rise and fall of the Nixon Administration's centralization effort.<sup>45</sup> According to Nathan, the effort involved an attempt to create a full-scale, parallel-regulatory apparatus within the White House to supplant the role traditionally performed by the agencies.<sup>46</sup> Suffice it to say, the effort failed for a lack of capacity,<sup>47</sup> resulting in agencies that actually ended up operating in a way that made them peculiarly unlikely to follow a coherent White House policy. In consequence, by its second term, the Nixon Administration had switched almost wholly to a politicization strategy. It asserted unprecedented control over staffing at the agency subhead level—the very power that the President had earlier given away.<sup>48</sup> That approach, too, came up short, however, as Watergate put an early end to the Nixon presidency. But even though the Nixon Administration ultimately failed in its centralization effort, and even though its preoccupation with that effort delayed its implementation of what might have been a more efficacious means of gaining control over the bureaucracy, subsequent Presidents have relied on scaled-down centralization efforts with a fair amount of success.<sup>49</sup> The two follow-on efforts that have mattered most—regulatory review and agency directives—have proved successful enough to become enduring parts of the contemporary regulatory scene.<sup>50</sup> As such, they have also become the primary subjects of the administrative law scholarship that addresses the White House-agency relationship.

## *B. Regulatory Review*

### *1. Introduction*

Out of the ashes of Watergate, the Reagan Administration championed the robust use of presidential power. This commitment resulted, jurisprudentially, in the development of what is now known as the unitary executive theory.<sup>51</sup> This theory takes aim at the modern administrative state's recognition of a so-called "headless fourth branch," namely, independent agencies that operate beyond the formal control of the President.<sup>52</sup> But, for all the scholarly ink that has

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<sup>45</sup> NATHAN, *supra* note 43.

<sup>46</sup> See NATHAN, *supra* note 43, at 34–38.

<sup>47</sup> *Id.* at 40–41.

<sup>48</sup> *Id.* at 8.

<sup>49</sup> See, e.g., Kagan, *supra* note 5, at 2277–87.

<sup>50</sup> See Bressman, *supra* note 16, at 487–88; Kagan, *supra* note 5, at 2292–93.

<sup>51</sup> See, e.g., Bressman, *supra* note 16, at 489.

<sup>52</sup> See Christopher S. Yoo, Steven G. Calabresi & Anthony J. Colangelo, *The Unitary Executive in the Modern Era, 1945–2004*, 90 IOWA L. REV. 601, 701 (2005).

been spilled in defense of the unitary executive theory,<sup>53</sup> it has not occasioned a practically significant challenge to the formal independent status of many agencies. Instead, the unitary executive theory has succeeded by legitimating presidential assertions of ever-greater policymaking influence over the federal agencies that are nominally under the Chief Executive's direct control.<sup>54</sup>

The theory suggests that the vesting of any executive decisional power outside the President is constitutionally dubious.<sup>55</sup> In other words, not only are "for cause" removal limits constitutionally problematic, but "at will" department heads are most properly viewed as being the mere extensions of the President. The limits, if any, of this theory are not always clear. The most extreme version contends that any regulatory power delegated to an agency is necessarily delegated to the President as well.<sup>56</sup> Yet, even if one does not believe that the President may literally exercise the precise power that has been statutorily conferred on a subordinate officer—say, by personally issuing rules regarding clean air or clean water, when that task ordinarily falls to the Administrator of the Environmental Protection Agency ("EPA")—the idea of the unitary executive is still significant. At a minimum, the theory suggests that the President may lawfully order a subordinate official to exercise policymaking discretion in a certain way and that such an official acts unlawfully—in the sense of upsetting the constitutionally vested chain of command—if he asserts a right to exercise an independent judgment. In so doing, the unitary executive theory challenges the very legitimacy of agency autonomy.

The President might still have no choice but to fire an in-subordinate agency official or at least force his ouster—as Nixon did during the so-called Saturday Night Massacre regarding the firing of Special Prosecutor Archibald Cox<sup>57</sup>—if he wants to ensure that a particular administrative action is taken. After all, President Nixon did not contend that he possessed the power to fire Cox, even though he claimed the power to fire the Attorney General for refusing to take such action. But by hammering home the idea that administrative

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<sup>53</sup> See Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 *YALE L.J.* 541, 545 & nn.4 & 6 (1994).

<sup>54</sup> See Strauss, *supra* note 1, at 737.

<sup>55</sup> See Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 *COLUM. L. REV.* 573, 597–99 (1984).

<sup>56</sup> See Strauss, *supra* note 1, at 703.

<sup>57</sup> KEN GORMLEY, ARCHIBALD COX: CONSCIENCE OF A NATION 338–61 (1997); Carroll Kilpatrick, *Nixon Forces Firing of Cox; Richardson, Ruckelshaus Quit*, *WASH. POST*, Oct. 21, 1973, at A1.

policymakers are supposed to take substantive direction from the President, the unitary executive theory does attempt to delegitimize the legal basis for agency resistance in the first place.

A wide array of doctrines and legal positions are rooted in the unitary executive theory—from restrictions on citizen standing to sue administrative agencies,<sup>58</sup> to challenges to various forms of congressional oversight of agency decisionmaking processes.<sup>59</sup> Even the *Chevron* doctrine may be traced, in part, to the notion that the President is supposed to make regulatory policy.<sup>60</sup> But important as these manifestations of the unitary executive principle are, the Reagan Administration gave it particular practical effect through the issuance of an Executive Order that mandated White House review of proposed agency regulations.

## 2. *What Is Regulatory Review?*

President Reagan issued Executive Order 12,291 at the outset of his first term,<sup>61</sup> and it proved to be highly controversial. The Order did nothing to challenge formal agency independence in the classic sense—it did not assert a presidential power to remove all agency heads without cause.<sup>62</sup> And it was also not wholly without precedent. In establishing an Office of Management and Budget (“OMB”), the Nixon Administration reviewed proposed regulations in a number of substantive policy areas, and it did so in a relatively systematic manner. But President Nixon’s review process was not designed to approve or disapprove proposals so much as it was instituted to ensure coordination and input across departments.<sup>63</sup> The Ford and Carter Administrations, moreover, put in place review requirements of their own.<sup>64</sup> These, too, were limited in scope and primarily consultative in nature.<sup>65</sup> The Reagan Order, by contrast, took regulatory review to a whole new level.

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<sup>58</sup> See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992).

<sup>59</sup> See Brief of Petitioners at 12–16, *Cheney v. U.S. Dist. Court*, 542 U.S. 367 (2004) (No. 03-475), 2004 WL 250239.

<sup>60</sup> See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984).

<sup>61</sup> Exec. Order No. 12,291, 3 C.F.R. 127 (1981), *reprinted in* 5 U.S.C. § 601 (1988), *revoked by* Exec. Order No. 12,866, 3 C.F.R. 638, 649 (1993), *reprinted as amended in* 5 U.S.C. § 601 (2000).

<sup>62</sup> See *id.*

<sup>63</sup> Kagan, *supra* note 5, at 2276.

<sup>64</sup> See *id.*

<sup>65</sup> *Id.* at 2276–77.

The Order mandated that agencies provide the OMB's Office of Information and Regulatory Affairs ("OIRA") all proposed major rules for OIRA evaluation to ensure that, "to the extent permitted by law," they would only be promulgated if their benefits exceeded their costs.<sup>66</sup> And although the Order did not expressly claim that the OMB could countermand agency decisions, it clearly conferred substantive authority on the White House entity. As Dean Kagan explains, "the order effectively gave OMB a form of substantive control over rulemaking: under the order, OMB had authority to determine the adequacy of an impact analysis and to prevent publication of a proposed or final rule, even indefinitely, until the completion of the review process."<sup>67</sup>

Reflecting its practical import, OMB review resulted in the rejection, in one form or another, of nearly ninety major rules a year during the Reagan Administration, and there were few instances of agencies bucking adverse White House reviews.<sup>68</sup> Nor has the review process ceased to be influential in subsequent administrations. In fact, if anything, subsequent Executive Orders (which all post-Reagan Presidents have issued) have only widened the scope of the review process by (1) expanding the kinds of rules subject to OMB review and the types of agencies nominally under the OMB's umbrella (including some independent ones), (2) moving up the stage in the promulgation process at which White House review kicks in, and (3) ramping up the language indicating the decisive influence of the President in resolving disputes between agencies and the OMB.<sup>69</sup> The Clinton Administration did make changes designed to increase transparency in the process and to alter the substantive standard by which rules would be adjudged so as to make the required cost-benefit inquiry somewhat less likely to head in a deregulatory direction.<sup>70</sup> But the process that President Reagan put in place remains very much the one that now operates; if anything, the review has become more vigorous, and, significantly, it is widely understood to continue to have a deregulatory effect.

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<sup>66</sup> Exec. Order No. 12,291 § 2, 3 C.F.R. 127, 128.

<sup>67</sup> Kagan, *supra* note 5, at 2278.

<sup>68</sup> See Kagan, *supra* note 5, at 2278–79.

<sup>69</sup> See, e.g., Exec. Order No. 13,045, 62 Fed. Reg. 19,885 (Apr. 21, 1997), *reprinted in* 42 U.S.C. § 4321 (Supp. III 1998); Exec. Order No. 12,866 §§ 2(b), 6(a)(3)(B), 3 C.F.R. 638, 640, 645 (1993), *reprinted in* 5 U.S.C. § 601 (2000).

<sup>70</sup> See Exec. Order No. 12,866 §§ 2(b), 6(a)(3)(B), 3 C.F.R. 638, 640, 645; see also Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 6–7 (1995).

This history makes it hardly surprising that those concerned with protecting administrative independence have expressed consistent concern about OMB review. Indeed, right from the start, such concerns led to a vigorous legal debate as to whether this form of White House control breached the separation of powers by disregarding Congress's power to vest policymaking discretion in the agencies themselves.<sup>71</sup> That debate appears to have been resolved in favor of the order's legitimacy—if only because of its consistent caveat authorizing White House input only “to the extent permitted by law.”<sup>72</sup> But that tautological savings clause still fails to impress many who continue to see regulatory review as the leading edge of a broader movement to challenge agency autonomy and to bring about the shift that the unitary executive theory champions—namely, a shift from the notion that the President is responsible for overseeing the decisions that agencies make to the notion that the President is actually entitled to determine how they are made.<sup>73</sup>

### 3. *The Limits of Regulatory Review*

Even though President Reagan's form of regulatory review gives the White House significant decisional power, it does much less than one might think to make the administrative decisionmaking process a truly presidential enterprise. As an initial matter, OIRA review is unlikely to solve the agency-slack problem completely, if only because OIRA review is expressly limited to certain significant rules. Necessarily, then, much ordinary and important agency policymaking goes on wholly outside OIRA's purview. The prospects for expanding the scope of such review, moreover, are dim. The problems of capacity that Moe identified early on—and that proved decisive in the Nixon Administration—necessarily establish an upper bound on the extent to which the routine of agency decisionmaking may be subjected to meaningful OIRA scrutiny.

Of course, that fact does not suffice to show that regulatory review is a weak form of presidential control. Presidents cannot concern themselves with everything, but neither can the public nor the press. It is reasonable to assume that a President's regulatory vision is communicated to the public through his own major speeches and the

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<sup>71</sup> See DeMuth & Ginsburg, *supra* note 38, at 1082–83; Morrison, *supra* note 38, at 1059.

<sup>72</sup> See Exec. Order No. 12,291 §§ 2, 3(a), 5(b), 6(a), 7(c), 7(e), 7(g), 3 C.F.R. 127, 128, 131–33 (1982), reprinted in 5 U.S.C. § 601 (1988), *revoked by* Exec. Order No. 12,866, 3 C.F.R. 638, 649 (1993), reprinted as amended in 5 U.S.C. § 601 (2000).

<sup>73</sup> See, e.g., Strauss, *supra* note 1, at 737–38.



large-scale regulatory actions that the bureaucracy takes, if only because these are likely to be the subject of media coverage as well as of congressional oversight and critique. A system that ensures that most proposed regulations of any scale are run through the OIRA review process, then, passably ensures that the President has a say as to much of what the public attributes to him. But there is still a more fundamental reason to doubt that OIRA review really ushers in what Dean Kagan has called “presidential administration”<sup>74</sup>—a practice that makes the President, rather than the agencies, responsible for making regulatory decisions. That reason relates to the way that regulatory review operates even as to those major rules that are subject to it.

When initially instituted, OIRA review—by mandating a cost-benefit analysis—had a deregulatory effect entirely consonant with the regulatory vision of President Reagan.<sup>75</sup> In this respect, it might have seemed that the Executive Order was a means of directly implementing President Reagan’s substantive regulatory agenda over and against the one that the agencies of the time preferred. But the fact that OIRA review had this effect at that time does not mean that it is well designed to ensure presidential rather than administrative control over regulatory policy as a general matter.

A system for making regulatory policy that is administrative in orientation may itself serve a given President’s agenda. After all, the whole idea of the administrative state, as defenders like James Landis made sure to emphasize, was to establish a policymaking apparatus that was at a remove from politics. Norms of independence, expertise, and professionalism—a kind of scientific approach—were to predominate. But the fact that the New Deal system was administrative in orientation hardly made it antagonistic to President Roosevelt’s political goals. It was through the administrative process, neutral and expert as it purported to be, that President Roosevelt achieved his political goals. As it happened, neutral administrative competence had a proregulatory tilt in that era, and it thus lined up well with the President’s political aim of bulking up the regulatory state. It would be odd, then, to describe the initial administrative framework as having permitted presidential administration. The whole point was to design a structure that would give actors outside the President’s control *administrative* power. And that was so even though the President, who was chiefly responsible for creating this au-

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<sup>74</sup> Kagan, *supra* note 5, at 2246.

<sup>75</sup> See Kagan, *supra* note 5, at 2278–82.

tonomous administrative structure, thought that it represented the best means of effectuating his own agenda.

In light of this background, President Reagan's Executive Order is best viewed as a new type of *administrative* check on the agencies rather than as one that is well-suited to permit presidential control of the administrative process. Far from imposing a presidential/political view of the world on top of an administrative/expert one, OIRA review is better conceptualized as instituting a new layer of technical (even neutral, bureaucratic) review, but one that is much more deregulatory in orientation because of the substantive inquiry that it requires OIRA analysts to undertake. Indeed, recent studies of OIRA review support this analysis. They consistently emphasize its limited utility as a mechanism for facilitating presidential control *vel non*.

In defending OIRA review, for example, Steven Croley emphasizes how "technocratic" it is in practice.<sup>76</sup> Indeed, he concludes that although "there is room for the White House to put values on regulatory costs or benefits in such a way as to advance its own political agenda,"<sup>77</sup> OIRA review is actually designed to make such influence difficult.<sup>78</sup> Croley highlights the extent to which the OIRA staff is comprised wholly of civil servants, with surprisingly little turnover from administration to administration.<sup>79</sup> As he explains, the OIRA Administrator, though a presidential appointee, does not function as "the White House's political tool who massages cost-benefit numbers to advance political ends."<sup>80</sup> Croley further documents a norm by which OIRA reviewers are generally insulated from the pressures that one might think would be brought to bear by the myriad political aides who are in close proximity.<sup>81</sup>

This aspect of the OIRA review process has not escaped the notice of the agencies themselves. In fact, Bressman and Vandenberg, in their important study of OIRA-EPA encounters across numerous administrations, found that "[a]ll EPA respondents were aware that OIRA staff members below the OIRA Administrator level were civil servants, not political appointees."<sup>82</sup> Moreover, these respondents

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<sup>76</sup> See Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821, 873 (2003).

<sup>77</sup> *Id.* at 874.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 873-74.

<sup>80</sup> *Id.* at 874.

<sup>81</sup> See *id.*

<sup>82</sup> Lisa Schultz Bressman & Michael P. Vandenberg, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 73 (2006).

noted that the civil servant reviewers frequently “exercised independence from the political control of the OIRA Administrator or other White House political appointees”;<sup>83</sup> a greater number of respondents indicated that such independence was asserted “often” than indicated that it was asserted “rarely” or “never.”<sup>84</sup> But whereas Croley relies on this independence to defend the legitimacy of OIRA review—portraying it as a kind of neutral form of sound administrative governance<sup>85</sup>—Bressman and Vandenberg see it as problematic. Insofar as regulatory review is supposed to ensure the kind of political control over the bureaucracy upon which the unitary executive theory rests, they argue, it is not at all clear that it is performing that function.<sup>86</sup>

Indeed, their survey finds that many agency respondents expressed concern that “OIRA review focused almost exclusively on the cost side of cost-benefit analysis[.]”<sup>87</sup> a fact that was not always attributed to a political judgment having been made by the White House.<sup>88</sup> To some, this focus on minimizing costs was reflective of a bias among career staffers at OIRA and, what’s more, might have had little support within the Executive Office of the President as a whole. In fact, as Bressman and Vandenberg report, one respondent from the Clinton Administration commented that OIRA was so committed to its version of cost-benefit analysis that it “pushed positions on rules [that were] not in keeping with the President’s views,”<sup>89</sup> while another stated that “the civil servants in OIRA, who had been there largely since the Reagan Administration . . . were more conservative and suspicious of EPA regulations than the political appointees.”<sup>90</sup>

This portrait is no doubt a bit overdrawn, but it nonetheless suggests that OIRA review is not simply a means of ensuring White House control. It suggests that OIRA may actually represent a kind of beau ideal of the neutral-expert agency, blessed with a large and entrenched staff that is selected primarily for its technical acumen, charged with a quantitative mission to reduce costly rules, and relatively impervious to outside pressures. Thus, although OIRA appears to implement its approach with a kind of single-minded determina-

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<sup>83</sup> *Id.* at 74.

<sup>84</sup> *Id.*

<sup>85</sup> Croley, *supra* note 76, at 879–82.

<sup>86</sup> Bressman & Vandenberg, *supra* note 82, at 75.

<sup>87</sup> *Id.* at 74.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* (quotation omitted).

<sup>90</sup> *Id.* (quotation omitted).

tion,<sup>91</sup> that seems to be less because it is a tool of the White House than because the Office is surprisingly immune from the influence of the larger political concerns that may predominate in the West Wing. Hence, OIRA review has a consistent deregulatory influence even in pro-regulatory presidential administrations.<sup>92</sup> It is ironic, then, that the contemporary defenders of neutral competence and of the importance of expertise often call for the creation of a type of superagency to perform the very kind of cost-benefit review in which OIRA now specializes.<sup>93</sup> In this way, the supposed antipathy between White House political control and expert-agency autonomy that typically has framed the contemporary legal debate over regulatory review seems to dissolve. The most visible form of White House political control, it turns out, has morphed into an autonomous administrative practice.<sup>94</sup>

### C. *Agency Directives*

#### 1. *Introduction*

If this account is accurate, then we should expect that Presidents will look for other means of making their own, more personal imprint on agency decisionmaking. After all, as Moe argues, the institutional logic of their position pushes all modern Presidents to attempt to exert ever-greater influence over the bureaucracy.<sup>95</sup> That is true not just of conservative Presidents, who one might expect to be more hostile to regulation, but of all contemporary Chief Executives, regardless of their ideological orientation. The public now expects the President to be responsible for so much, and given that the administrative agencies' jurisdiction is so vast, no President can succeed in implementing any kind of program without getting control over the administrative state.<sup>96</sup>

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<sup>91</sup> See Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1260 (2006).

<sup>92</sup> See *id.* at 1262.

<sup>93</sup> See, e.g., STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* 59–61 (1993).

<sup>94</sup> For an argument that agency cost-benefit analyses meaningfully facilitate control by elected officials because they make agency judgments more transparent to the White House (and Congress), see Eric A. Posner, *Controlling Agencies with Cost-Benefit Analysis: A Positive Political Theory Perspective*, 68 U. CHI. L. REV. 1137, 1141–43 (2001). Posner has elsewhere suggested that the current means of enforcing cost-justified agency regulation may be inadequate to permit effective presidential control and that new mechanisms might be desirable. See Eric A. Posner, *Using Net Benefit Accounts to Discipline Agencies: A Thought Experiment*, 150 U. PA. L. REV. 1473, 1473–74 (2002).

<sup>95</sup> See Moe, *supra* note 30, at 238–41.

<sup>96</sup> See *id.* at 239.

Evidence of the limited capacity of OIRA to sate the presidential desire for control can be found in the Bressman and Vandenberg study. They note that, even within the White House, OIRA does not play the dominant role in influencing “big ticket” EPA decisions.<sup>97</sup> Rather, it is other White House officers and officials that tend to be more influential.<sup>98</sup> Further evidence can be found in Dean Kagan’s study of, and argument for, the presidential issuance of orders directing agencies to initiate specified regulatory actions.<sup>99</sup> In fact, she emphasizes the surprisingly limited presidential influence on the OIRA process in arguing that the increased use of agency directives represents a potentially more significant development in the turn toward what she calls “presidential administration.”<sup>100</sup>

Presidents interested in promoting a more pro-regulatory agenda are, in principle, no less wary of bureaucratic independence than deregulatory Presidents. They worry that agencies will be slow to act and even slower to innovate. To get agencies to do something is no small feat; it can even be harder than stopping them. Hence, Presidents need some means of prompting agency action. Directives provide a ready tool. Of course, directives need not be forward-looking. They also could take the form of commands to refrain from acting.

In addition, there is no necessary reason why OIRA itself could not be the prompting entity. OIRA could request action where benefits would exceed costs but the agency has done nothing, and a now standard reform proposal encourages OIRA to do just that.<sup>101</sup> But Kagan shows that this prompting function has, in fact, tended to be exercised by the Domestic Policy Council and a variety of other White House officials—even the President himself.<sup>102</sup>

## 2. *What Are Agency Directives?*

President Clinton was the innovator here. Just as President Reagan built on past precedents to develop a systematic form of regulatory review, other Presidents had on occasion issued agency directives. But President Clinton made the practice an actual governance strategy.<sup>103</sup> The Clinton Administration relied heavily on “the use of for-

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<sup>97</sup> Bressman & Vandenberg, *supra* note 82, at 68.

<sup>98</sup> *Id.*

<sup>99</sup> Kagan, *supra* note 5, at 2290–303.

<sup>100</sup> *Id.* at 2284–85, 2290–300.

<sup>101</sup> See Bagley & Revesz, *supra* note 91, at 1277–80 (discussing OIRA’s use of “prompt letters”).

<sup>102</sup> Kagan, *supra* note 5, at 2297–98.

<sup>103</sup> *Id.* at 2293–95.

mal directives (generally styled as memoranda to the heads of departments) instructing one or more agencies to propose a rule or perform some other administrative action within a set period of time” as well as on “the personal appropriation by Clinton of regulatory action, accomplished through regular public events sending a message, to the public and agency officials alike, that the action in question was his own rather than the agency’s product.”<sup>104</sup> The use of the directives on the front end—“issued prior to OMB review (in the case of rules) or independent of this review (in the case of other administrative action, not subject to the OMB process)”<sup>105</sup>—permitted “Clinton and his White House staff to instigate, rather than merely check, administrative action.”<sup>106</sup> This innovation became “a powerful mechanism for steering the administrative state toward Clinton’s policy objectives,”<sup>107</sup> constituting “a critical means of spurring administrative initiatives, and these initiatives were an important aspect of his tenure in office.”<sup>108</sup>

Such directives were not just public manifestations of the private, presidential jawboning that would otherwise have taken place. They were announced as legal utterances, which made them more powerful instruments of presidential control. Kagan makes this point in terms that precisely track Strauss’s concern about the shift from an overseer to a decider paradigm: “The unofficial became official, the subtle blatant, and the veiled transparent in ways that reasonably might affect evaluation, especially with respect to norms of accountability, of the underlying practice.”<sup>109</sup> By virtue of being public directives, moreover, agency resistance to them was made all the more difficult; with a “spotlight” now trained on the agency officials, “the costs of noncompliance” increased.<sup>110</sup> So, too, did the agency’s own understandings of the obligation to comply. This approach mattered: it locked an agency into a path that it had not yet finally settled upon, necessarily “prompted the White House staff to participate actively, if privately, in the administrative process that gave rise to them,”<sup>111</sup> and “sent a loud and lingering message: these were *his* agencies; *he* was responsi-

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<sup>104</sup> *Id.* at 2285.

<sup>105</sup> *Id.* at 2290.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 2294.

<sup>108</sup> *Id.* at 2296.

<sup>109</sup> *Id.* at 2299.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 2302.

ble for their actions; and *he* was due credit for their successes”<sup>112</sup>—a message that, even if lost on the public, was keenly felt within the bureaucracy.

The power to direct is an important one. Because it is not systematized and does not reflect any underlying scientific logic, it can be constantly shaped and tweaked on a case-by-case basis so as to ensure that, as a whole, the strategy well-reflects the particular policy desires of the President at a given moment. Its ad hoc quality is its virtue. It is less likely to become just one more administrative process that is untethered to the President’s own regulatory vision. It is well-suited to ensure that the President, in conjunction with his closest White House aides, can make agencies do his bidding.

Precisely because agency directives permit such presidential control, however, they provoke special concern about their potential to upset the constitutional plan. The terms of the legal debate over agency directives are somewhat complex. Committed unitarians would seem to have no difficulty with them. Statutes that bar such directives without simultaneously limiting the statutorily conferred discretion the agencies possess would seem to be obvious, unconstitutional attempts to divest the President of his executive power to determine how policymaking discretion should be exercised at the agency level. Defenders of agency independence, by contrast, would seem likely to be equally confident in defending the lawfulness of such legislative limits. Policymaking discretion can be vested in the agencies, they would argue, and Presidents are obliged to respect that allocation of authority, so long as they can ensure that the laws are being faithfully executed—a judgment that can be particularly constraining of presidential control once one recognizes that one of those “laws” is the statute that precludes the issuance of White House directives.

Of course, as with OMB review, it is not clear that the constitutional question is the correct one. Even if Congress could limit the use of directive power, it is not clear that it has. Dean Kagan argues that, in the absence of a clear legislative prohibition, it makes sense (at least for the agencies not protected by “for cause” removal limitations) to conclude that the President has the authority to direct agency discretion within the scope of the statutory delegation.<sup>113</sup> Certainly, she contends, the mere fact that policymaking discretion has been expressly conferred on an agency head should not be thought to consti-

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<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 2319–28.

tute a plain congressional intention to bar the President from directing agency officials to exercise that discretion in a certain way.<sup>114</sup> Professor Strauss and others, however, have offered powerful arguments in response, indicating that Congress could not plausibly be thought to have acceded to such exercises of presidential power given their obvious desire to delegate policymaking authority to the agencies and not the President.<sup>115</sup> And these scholars suggest that the possible statutory impediments to the issuance of such agency directives are numerous, extending well beyond the provisions that simply name the agency official responsible for heading the agency to include some provisions of the Administrative Procedure Act<sup>116</sup> as well.<sup>117</sup>

### 3. *The Limits of Agency Directives*

As with regulatory review, however, it is important to bracket the merits of the legal debate in order to evaluate whether this form of centralization is actually a major means by which the White House could control the bureaucracy. As Kagan notes, the Clinton Administration's directive approach was limited in important respects.<sup>118</sup> For one thing, President Clinton did not direct independent agencies the way he directed those that were headed by officers serving at his pleasure<sup>119</sup> (perhaps because he regarded statutory removal limitations as implicit prohibitions on his power to command the action of agencies so protected). President Clinton also seems to have refrained from taking "a public role in formulating agency rules and other decisions relating to hazardous substances in the environment and workplace,"<sup>120</sup> perhaps out of a "general, if unarticulated, sense that these actions involved significant levels of scientific expertise and thus offered less space for presidential involvement."<sup>121</sup>

Even these very significant caveats, however, do not adequately convey the limited utility of agency directives as a mechanism of presidential control, at least as they have been deployed to this point. Over the course of an eight-year presidency, according to Kagan,

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<sup>114</sup> *Id.*

<sup>115</sup> See, e.g., Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 267 (2006); Strauss, *supra* note 1, at 749.

<sup>116</sup> Administrative Procedure Act, ch. 324, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

<sup>117</sup> See Stack, *supra* note 115, at 318; Strauss, *supra* note 1, at 750.

<sup>118</sup> Kagan, *supra* note 5, at 2307–09.

<sup>119</sup> *Id.* at 2308–09.

<sup>120</sup> *Id.* at 2308.

<sup>121</sup> *Id.*



President Clinton issued directives 107 times.<sup>122</sup> Of these, a number related to matters that were of little consequence—orders to collect statistics on this or that problem.<sup>123</sup> These may have been useful prods, but commands to gather facts are hardly the stuff of which energetic government is made or presidential legacies are fashioned. Another substantial set were not actually commands to agencies to do what they did not want to do; rather, they were directives to do what the agency was already doing.<sup>124</sup> These may have been important in keeping the agency from backtracking on actions once begun. But these examples, too, do not suggest that directives are a key means of making the agency move in the President's direction. Let us say, then, that half of the directives that have been identified were actually orders to do something that the agency did not want to do. That is roughly six directives a year. By my lights, none of the directives that fall within this category was really of particularly earth-shattering significance. Indeed, the single most important one was probably the White House directive to the Food and Drug Administration ("FDA") regarding the tobacco rules, but that directive was issued after the rules had already been drafted.<sup>125</sup> That was a case of appropriation at least as much as it was one of direction.<sup>126</sup> To be sure, there may well have been an uptick in such directive control during the most recent Administration—particularly if press reports are accurate. But even still, there are limits to just how far the President can, on a case-by-case basis, exercise such control from the White House. At some point, such an effort necessarily falls of its own weight for reasons similar to those that doomed Nixon's attempt to establish a true counterbureaucracy.

All of this suggests that if the President has a natural desire to assert greater and greater control over the bureaucracy—a desire spurred on by the logic of his institutional environment, one in which legislative initiatives are hard to achieve and public expectations about his capacity to make change are immense—the directive approach will not satisfy it. The power is too limited, too weak, too small bore to amount to much. And the felt constraints on the approach—particularly the one concerning matters of scientific judg-

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<sup>122</sup> *Id.* at 2294.

<sup>123</sup> *See id.* at 2295.

<sup>124</sup> *See id.* at 2297 n.214, 2298–99.

<sup>125</sup> *See id.* at 2282–83.

<sup>126</sup> *Id.* at 2301 (indicating that President Clinton's unveiling of proposed tobacco rules more closely resembled appropriation than direction because of the President's strong intimation that the final rules the FDA would adopt would be similar or identical to those proposed).

ment—seem destined to ensure that presidents will not look to it to ensure that agencies conform to their own regulatory vision. Far from permitting the President to make the administrative agencies his own, and thereby gain ownership of much domestic policymaking, such directives seem more likely to be a limited tool for making some incremental policy advances in the face of legislative gridlock.

#### *D. Conclusion*

The point in highlighting the limited reach of these two prominent forms of centralization is not to suggest that either regulatory review or agency directives are inconsequential practices. Professor Strauss quite rightly describes the important role that they have played in shifting understandings of the White House-agency relationship from one that assigns the President the power of oversight to one that gives him the power of decision.<sup>127</sup> Although the difference between these conceptions “can be subtle, particularly when the important transactions occur behind closed doors and among political compatriots who value loyalty and understand that the President who selected them is their democratically chosen leader,”<sup>128</sup> Strauss is right to argue that “there is a difference between ordinary respect and political deference, on the one hand, and law-compelled obedience, on the other. The subordinate’s understanding which of these is owed, and what is her personal responsibility, has implications for what it means to have a government under laws.”<sup>129</sup> As Dean Kagan’s own analysis indicates, it is just that difference in the psychology of the office that makes the turn toward presidential administration, which she finds so normatively appealing, a potentially transformative occurrence in the development of the modern regulatory state.<sup>130</sup>

But if an effort is afoot to reduce the policymaking capacity of autonomous administrative agencies, there are other ways of doing so that may be at least as influential and effective, and likely more so. As Moe notes, politicization (in the form of aggressive, politically based staffing efforts) is chief among the means by which Presidents seek to counter the prospect of agency independence. It is difficult to assess with confidence whether one of these strategies—centralization or politicization—dominates. But this much does seem clear: the two are substitute strategies—the more Presidents politicize the bureau-

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<sup>127</sup> See Strauss, *supra* note 1, at 730–38.

<sup>128</sup> *Id.* at 704.

<sup>129</sup> *Id.*

<sup>130</sup> See Kagan, *supra* note 5, at 2299.

cracy, the less they seem to need to centralize regulatory policymaking in the Executive Office of the President.<sup>131</sup> That makes it all the more important to analyze politicization as a distinct phenomenon.

### III. Politicization

“In the real world,” Professor Strauss candidly and correctly notes, agency officials may be primed to jump when merely asked (but not directed) to do so, given “the tendencies both of some leaders to appoint yes men, and of other appointees (those not meeting this description) to feel the impulses of political loyalty to a respected superior and of a wish for job continuity.”<sup>132</sup> This point, however, deserves elaboration; it is too fundamental to be offered simply as a caveat to a sweeping indictment of presidential attempts to trump agency judgments. What ultimately matters is whether agencies are functioning in practice as autonomous administrative actors—not simply whether, as a formal matter, the White House or the agency issues a given regulatory decision. It is of interest, therefore, whether agencies are now staffed in ways that make them increasingly likely to speak the White House line as if it were their own, even if they have not been ordered to do so by the President.

Nor is the only problem that some number of appointees may be mere “yes men,” in the pejorative sense that they have no regard for professional norms, or even legal restrictions on their authority to serve the short-term desires of their political overseers. Even if the only sin of many new appointees is that they increasingly share the regulatory vision of the President and his party, it is still worth noting that they now usually do. The emergence of a single-minded regulatory vision within a presidential administration is a potentially serious cause for concern in its own right, even if such a development cannot be characterized as undermining the rule of law or breaching the separation of powers. Such regulatory myopia can be a substantial impediment to social learning—a capacity that the administrative system, with its Progressive Era roots, was surely meant to facilitate through its celebration of the autonomous, administrative perspective.<sup>133</sup>

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<sup>131</sup> Andrew Rudalevige & David E. Lewis, *Parsing the Politicized Presidency: Centralization and Politicization as Presidential Strategies for Bureaucratic Control* 3, 6–9 (Sept. 1, 2005) (unpublished paper, available at [http://www.allacademic.com/meta/p41000\\_index.html](http://www.allacademic.com/meta/p41000_index.html)).

<sup>132</sup> Strauss, *supra* note 1, at 714.

<sup>133</sup> See Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 292–97 (1998) (recounting historical importance of social learning to the intellectual founders of the modern regulatory state).

Thus, for all the attention that recent administrative law scholarship has given to the legal issues that new forms of centralization raise, it is important to consider what has been happening along the dimension of politicization. Two trends are particularly noteworthy—the increase in the number of political appointees that are available to the President, and the increased control over the selection process that the White House now exerts.

*A. Numbers of Appointees*

It is difficult to get a firm grip on the number of political appointees that serve in the bureaucracy, let alone how that number compares to previous decades. That is particularly the case if one is interested in determining how many of these appointees serve in positions that would actually play a meaningful role in influencing regulatory policy. Part of the problem arises from the large number of advisory commissions. Growth in the number of these positions does not demonstrate enhanced White House capacity to control the actual bureaucracy. Advisory commission members are not appointees in the constitutional sense; they do not wield significant governmental authority pursuant to statute precisely because they merely issue reports and the like. The commissions are not rulemaking or enforcement entities. Nor do they even determine how federal funds may be spent.

Another difficulty concerns the large number of political appointees who do wield constitutionally significant authority but who are not actually involved in carrying out standard-issue regulatory functions. Ambassadors, federal judges, and federal prosecutors are not really part of the bureaucracy that concerns administrative law scholars; increases in their ranks tells one little about whether there has been a surge in political appointees within the “agencies.” Similarly, there apparently has been an expansion in Department of Defense political appointees, but it is very hard to grasp the extent to which this increase has concerned the Department’s policymaking functions. And, in any event, the Department of Defense is itself not an agency with which administrative law scholars usually concern themselves. The bread-and-butter of the field are the health, safety, and welfare agencies.

One also has to account for the expansion of the size of the bureaucracy as a whole. When a new agency is created, new political offices are established. This change necessarily increases the sheer number of political appointees in the bureaucracy, but it does not

show that there has been an increase in the opportunities for politicizing it. A large new agency that is headed by a single political appointee—to take a hypothetical but heuristically useful example—is obviously not politicized to any great degree. Therefore, the number of political appointees could increase, even if agencies were to become less subject to political control, because their civil service ranks would swell even more.

That said, the most thorough studies find that since World War II, there has been a significant expansion in the number of political appointees within agencies such that the federal bureaucracy is now organized in a way that makes it ripe for the kind of enhanced politicization that Moe discusses. A recent study finds, for example, that, excluding ambassadors, federal prosecutors and marshals, appointees to international organizations, and customs officers, the number of full-time political appointees serving in the federal government jumped from 2150 in 1964 to 3687 in 1992.<sup>134</sup> Significantly, the bulk of this increase is in positions that are not subject to Senate confirmation. This change increases the likelihood that these new positions will be filled by persons selected on the basis of their affinity with the White House's own regulatory program rather than on the basis of criteria that Senators might give greater weight. Indeed, if one uses a slightly different counting method, the number of Senate-confirmed presidential appointees increased only from 420 in 1964 to 581 by 1992, while the number of non-Senate-confirmed presidential appointments in that period nearly doubled.<sup>135</sup> And although not all of these appointments are vested by statute in the President alone, they remain executive branch appointments and thus potentially subject to being made with substantial White House influence.

In a similar vein, it appears there also has been an important shift in the overall mix of jobs within the bureaucracy. That shift has come at the expense of clerical workers, and others, whose employment makes them poorly positioned to influence actual regulatory policy. The rise in the ranks of economists, engineers, scientists, and lawyers within the bureaucracy itself increases the opportunities for Presidents to remake the bureaucracy in ways that are likely to promote a particular view of regulatory policy. Such positions, even if technically nonpolitical, are integral to the formulation of policy. A White House committed to screening candidates to fill these positions in order to

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<sup>134</sup> THOMAS J. WEKO, *THE POLITICIZING PRESIDENCY: THE WHITE HOUSE PERSONNEL OFFICE, 1948–1994*, at 161 (1995).

<sup>135</sup> *Id.*

promote a particular ideology, therefore, now has greater opportunity to do so. I discuss below the extent to which presidents have attempted to use ideology to influence the selection of persons to fill these jobs.<sup>136</sup> For now, it is sufficient to note that the existence of more and more jobs of this type itself facilitates politicization.

Finally, these newly appointed positions have “thickened” the political ranks within the bureaucracy such that “the federal government has more [political] leaders than ever.”<sup>137</sup> As Paul Light explains, “[i]n 1960, there were seventeen layers of management at the very top of government, of which eight existed in at least half or more of the departments. By 1992, there were thirty-two layers, of which seventeen existed in at least half the departments.”<sup>138</sup> The result is the proliferation of grades from chiefs of staff to assistant secretaries, principal associate deputy undersecretaries, and their attendant counsels and special assistants. Consider what has happened at the assistant secretary level alone. It grew from forty-three occupants and two layers in 1935 to 1439 occupants and eight layers half a century later.<sup>139</sup> And this is not just the result of newly created agencies. Those serving in leadership positions within longstanding agencies have clearly increased in number, and by orders of magnitude.<sup>140</sup> All of this increase in political layers within individual agencies means that civil servants now have less and less direct access to the final political decisionmakers and less of a chance of taking action without being challenged by a political official. To make their case, they must run a gauntlet of political appointees.

David Lewis provides the most comprehensive analysis of the issue, and his work further supports the conclusion that the bureaucracy is now comprised of many more political appointees than before. Lewis notes that the percentage of federal employees in the civilian workforce under the merit system reached its peak in 1951, at nearly ninety percent.<sup>141</sup> Now, nearly half of all positions are exempt from the “traditional merit system”<sup>142</sup> and thus susceptible to some imprecise extent of being selected on a political basis. Of these “politicals,”

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<sup>136</sup> See *infra* Part III.B.

<sup>137</sup> LIGHT, *supra* note 22, at 7.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 9.

<sup>140</sup> See *id.* at 11.

<sup>141</sup> DAVID E. LEWIS, *THE POLITICS OF PRESIDENTIAL APPOINTMENTS: POLITICAL CONTROL AND BUREAUCRATIC PERFORMANCE* (forthcoming 2008) (manuscript at Ch. 2, 15–16, on file with author).

<sup>142</sup> *Id.* (manuscript at Ch. 2, 18).

about 450 are Senate-confirmed presidential appointees occupying “important policy-making positions.”<sup>143</sup> Another 700 or so are politically selected members of the Senior Executive Service (“SES”),<sup>144</sup> a cadre of non-civil service protected managers created in the late 1970s as part of President Carter’s significant civil service reforms.<sup>145</sup> Another 1600 are so-called Schedule C appointments, which are technically selected by agency officials but, as political appointees, are also susceptible to White House preferences.<sup>146</sup> This class of political positions was also the result of presidential action—it was established by an Executive Order issued by President Eisenhower.<sup>147</sup>

There are statutory constraints on the White House’s ability to create new appointments, but they are not onerous. By statute, political SES positions within an agency cannot exceed one-quarter of the total number of SES positions within that agency, and the percentage of political appointees within the SES as a whole may not exceed ten percent.<sup>148</sup> There are also some limits on the ability of Presidents to reassign career SES employees and replace them with political appointees, but these limits are not severe.<sup>149</sup> And there are even fewer constraints on the creation of Schedule C positions and their corresponding presidential appointments. These positions can be established, assuming available funds, so long as the Office of Personnel Management—an agency that is itself headed by a political appointee—approves a presidential request to do so.<sup>150</sup> These 2300 SES and Schedule C positions alone dwarf, by orders of magnitude, the number of political appointees available to the executive leaders of most European nations.

Lewis does emphasize that between 1984 and 1992, the percentage of political appointees relative to civil servants actually dropped.<sup>151</sup> It is not the case, therefore, that more and more political positions are being created year after year. The huge growth in political positions occurred between World War II and the Reagan Administration, and then tapered off. Lewis also finds that the growth has not been the consequence of efforts by one of the major political par-

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<sup>143</sup> *Id.* (manuscript at Ch. 2, 19).

<sup>144</sup> *Id.* (manuscript at Ch. 2, 20).

<sup>145</sup> *Id.* (manuscript at Ch. 2, 48–49).

<sup>146</sup> *Id.* (manuscript at Ch. 2, 22).

<sup>147</sup> *Id.* (manuscript at Ch. 1, 2, 22).

<sup>148</sup> *Id.* (manuscript at Ch. 2, 24–25).

<sup>149</sup> *Id.* (manuscript at Ch. 2, 25).

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* (manuscript at Ch. 3, 6).

ties to the exclusion of the other.<sup>152</sup> The Republican Eisenhower created Schedule C appointees, while the Democrat Carter gave us the SES.

These facts might suggest that the growth in politically appointed positions does not facilitate politicization—indeed, they might suggest that politicization has little to do with the increase at all. On this view, the growth is simply a managerial response to greater administrative complexity that Presidents of both parties have made and one that basically halted after the massive expansion in the bureaucracy began to slow down. Along the same lines, it often is argued that the increase in political appointments has actually diminished rather than enhanced presidential control over the bureaucracy. Such a claim could also be advanced to support the notion that Presidents have not really been seeking to use the appointment power to move the bureaucracy to promote their own regulatory agenda so much as they have (mistakenly) been trying to put an efficient management structure in place.

Paul Light contends, for example, that the layering upon layering of political management within agencies—what he terms the “thickening” of government—diffuses accountability,<sup>153</sup> distorts communication between top and bottom,<sup>154</sup> and produces administrative inertia.<sup>155</sup> In other words, politicization actually bureaucratizes the bureaucracy more than it makes the bureaucracy responsive to presidential influence. In so arguing, Light builds upon a contention that Hugh Hecló first advanced in the wake of the Nixon Administration’s demise, in which he contended that the “bureaucratic growth of political appointments—their increased numbers, the division of labor, and hierarchical layering—invites bureaucratization.”<sup>156</sup> In this way, reformers often defend reducing political appointees on the ground that it will permit *greater* presidential control.

On closer inspection, however, both Light and Hecló offer powerful evidence that the desire of Presidents to ensure that the bureaucracy responds to their policy desires *is* responsible for the thickening and layering they bemoan. Light, for example, notes that a major reason for the increase in political layers within agencies is that Presi-

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<sup>152</sup> *Id.* (manuscript at Ch. 3, 4–5).

<sup>153</sup> LIGHT, *supra* note 22, at 64.

<sup>154</sup> *Id.* at 65.

<sup>155</sup> *Id.* at 66–67.

<sup>156</sup> HUGH HECLÓ, A GOVERNMENT OF STRANGERS: EXECUTIVE POLITICS IN WASHINGTON 65 (1977).



dents have come to view civil servants with suspicion.<sup>157</sup> The original defense for increasing the number of specialized management positions rested on a claim about the inherent frailty of all leaders—no one person could be expected to effectively supervise many.<sup>158</sup> It was a management, rather than a political, strategy. But, Light notes, “[b]y the 1950s . . . the span-of-control principle was starting to be justified by the frailties, even outright sabotage, of subordinates—presidents and their staffs began to complain of their inability to influence unwieldy bureaucracy, of disloyalty in the civil service, of cabinet secretaries being ‘captured’ by their departments.”<sup>159</sup> Light, too, provides support for concluding that, post-Truman, the question became “less and less how to provide the best leadership and more how to protect the president against the self-serving behavior of bureaucrats,”<sup>160</sup> and Hecllo notes that “as political levels have become bureaucratized, incentives have grown for the White House to politicize the bureaucracy.”<sup>161</sup>

Moreover, David Lewis’s intricate analysis of the relevant data provides further support for the conclusion that Presidents have been quite consciously seeking to increase the number of political appointees within agencies in order to overcome what they perceive to be civil-service-led resistance to their preferred policies.<sup>162</sup> Lewis finds, for example, that there has been a consistent expansion in the number of such appointments when there has been a transition from a President of one political party to a President of the opposite party.<sup>163</sup> By contrast, the increases are much smaller when the transition is an intraparty one.<sup>164</sup> That fact suggests that new Presidents do try to use the appointment of new politicals to shift the policy direction of a bureaucracy that formerly had been controlled by a President with a different regulatory vision.

Similarly, Lewis finds that increases in political appointments occur in those agencies that are perceived to be the least sympathetic to the ideology of the President then in office—e.g., conservative Presidents seek to increase the political ranks in “liberal” agencies, and

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<sup>157</sup> See LIGHT, *supra* note 22, at 36.

<sup>158</sup> See *id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> HECCLO, *supra* note 156, at 68.

<sup>162</sup> LEWIS, *supra* note 141 (manuscript at Ch. 3, 2–5, 25).

<sup>163</sup> *Id.* (manuscript at Ch. 4, 10–11).

<sup>164</sup> *Id.* (manuscript at Ch. 4, 11).

vice versa.<sup>165</sup> In this respect, political more than neutral management imperatives seem to be driving presidential efforts to increase and deepen political appointees' presence within the bureaucracy. That Lewis finds a major surge in the number of politically appointed positions created during the first term of President George W. Bush<sup>166</sup> (virtually none of which required Senate confirmation), moreover, shows that Presidents have not lost their appetites for expanding the political ranks. And, so, too, does the fact that although Vice President Gore's reinventing government initiative called for a major reduction in the federal workforce, it did not propose to eliminate one single position subject to political appointment.<sup>167</sup>

It is possible, of course, that Presidents have been seeking an outcome through means that are destined to fail. It is possible that public administration scholars like Hecla and Light are right in saying that an increase in the number of political appointees does not afford the President an efficient mechanism for imprinting his own regulatory vision on the agencies. Like an elaborate game of telephone, the thickening that these analysts describe may only have ensured that a garbled presidential message is expressed at the end of the line. But absent strong evidence to that effect, it seems reasonable to assume that a now three-decade-old presidential practice—and one that the evidence indicates is intended to ensure greater White House policy control—holds out the potential to be at least somewhat effective. Since Presidents themselves appear to think that what they are doing beats the alternative, it seems reasonable enough to presume that an increase in the number of political appointees helps the Chief Executive exert control to some difficult-to-quantify extent.

### *B. Selecting Appointees*

That said, because increases in the number of potentially influential political offices within agencies do not necessarily show that the bureaucracy has been politicized, it is worth exploring the question a bit further. After all, Presidents may not have capitalized on these new appointment opportunities to check potential points of bureaucratic resistance and to promote their own particular policy program. Indeed, because many of these new appointed positions are not formally for the President to make, it is possible that agency heads use them to augment their own capacity to formulate a semi-independent

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<sup>165</sup> See *id.* (manuscript at Ch. 4, 20).

<sup>166</sup> *Id.* (manuscript at Ch. 4, 8–9).

<sup>167</sup> See LIGHT, *supra* note 22, at 32–34, 36.

policy that is potentially counter to the White House. And even though these new positions may be “political” in the sense that they are not filled through the civil service system, longtime career civil servants have been known to be promoted to them. In fact, one of the justifications for the creation of these new management layers is to keep qualified civil servants in government by creating career ladders for them. Norms could be in place, therefore, that would make a President’s ability to exploit the new opportunities for taking greater political control over the bureaucracy relatively limited in practice.

The reality, however, is that, at least since 1980, Presidents have begun to assert an unprecedented degree of direct control over the selection process, exercising it in a manner that places a premium on loyalty and ideological affinity.<sup>168</sup> Since the Reagan Administration, in fact, Presidents seem to have made this approach to agency appointments a critical aspect of their overall governing strategy.

As late as the Kennedy Administration, Presidents took a surprisingly—even shockingly—hands-off view of the appointments process. The White House office responsible for personnel decisions, for example, was a poorly staffed and notoriously underresourced operation. Now, it “has become a large, specialized, and decidedly visible bureaucracy of nearly six hundred individuals.”<sup>169</sup> In consequence, “it has accumulated enormous power and now has hold of many of the prerogatives that once belonged to other leaders in the Washington community, including party officials, the president’s cabinet, and career civil servants.”<sup>170</sup>

Other than cabinet-level officers, appointments were once made largely by the agencies themselves, and with surprisingly little White House input. To the extent that political forces determined appointments, the most influential voices came from Congress and the political parties of the President then in power.<sup>171</sup> The Democratic and Republican National Committees, in other words, played a major role in staffing decisions, even though neither of these institutions was particularly focused on ensuring that such appointments would be well designed to effectively implement the President’s regulatory agenda. Patronage, rather than policy, would be the determining factor guiding such appointment decisions.

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<sup>168</sup> See Kagan, *supra* note 5, at 2277; Lessig & Sunstein, *supra* note 20, at 4.

<sup>169</sup> WЕКО, *supra* note 134, at 1.

<sup>170</sup> *Id.*

<sup>171</sup> See *id.*

At least through the Truman Administration, the White House “nurs[ed] political referrals and clear[ed] official appointments in order to placate those political leaders in Congress and in state, local, or other organizations who might otherwise take exception.”<sup>172</sup> Hence, Heclo concludes, “[w]ithout too much exaggeration it seems reasonable to say that throughout all the New Deal and Fair Deal years, political patronage was used more as a means of managing potential political conflict than of building a network of presidential loyalists throughout the executive branch.”<sup>173</sup> Exemplary of the weak White House role, Vice President Nixon did lead an effort to challenge the civil service—an institution that the first Republican presidency since the New Deal viewed with great suspicion.<sup>174</sup> But that innovative practice, known as the Willis Directive, was remarkably tame: it involved the appointment of a special assistant in each agency to oversee the filling of vacancies “by reporting them to the Republican National Committee.”<sup>175</sup>

Now, however, Presidents expressly shun the political party committees when it comes to filling appointments, precisely because the committees do not recommend appointees that dependably promote the President’s regulatory mission. Where once political appointees were often “veterans of party politics who were far more interested in quiet sinecures than galvanizing the bureaucracy to support a presidential program,”<sup>176</sup> they are now “keenly loyal to the president they serve and aggressively push his policies and political concerns.”<sup>177</sup> A major reason for this reallocation of appointing control from the parties to the presidency is the loosening of the parties’ control over the nominating process. As Presidents have become less dependent on the party apparatus for nominations—and more likely to create their own personal network of supporters and loyalists—they owe less to the party upon taking office. In consequence, they feel less obliged to turn to the party to staff “their” government.

This shift began during President Kennedy’s term in office, but it has gathered steam in each successive administration. The Reagan Administration, building on the abortive attempt of the Nixon Administration to assume comprehensive control over all political ap-

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<sup>172</sup> HECLo, *supra* note 156, at 71.

<sup>173</sup> *Id.*

<sup>174</sup> LIGHT, *supra* note 22, at 46.

<sup>175</sup> *Id.*

<sup>176</sup> WEKO, *supra* note 134, at 1.

<sup>177</sup> *Id.*

pointments, was most responsible for dramatically changing traditional practices. The White House Office of Personnel became the critical actor, and the Republican National Committee became a bit player. The goal was to identify not merely party loyalists but rather Reaganites who would have the capacity to implement the President's various policy positions, both because of their commitment to them and because of their own knowledge of them.<sup>178</sup> Consider that

Reagan recruited more Republicans and conservatives than any president in recent history. Ninety-three percent of Reagan's political appointees and 40 percent of his senior career civil servants identified themselves as Republicans, in contrast to 66 percent of Nixon's politicals and only 17 percent of his senior careerists. At the same time, 72 percent of Reagan's political appointees and 47 percent of his careerists opposed an active role of government in the economy, in contrast to just 19 percent and 13 percent respectively under Nixon.<sup>179</sup>

Reagan's approach, moreover, has become the new tradition. One Clinton personnel official recounted that President Clinton's cabinet nominees were told, "[t]hese positions are Bill Clinton's and he appoints them—the Senate-confirmed positions, the non-career SES positions, and the Schedule C positions—he selects them."<sup>180</sup> Bruce Ackerman succinctly describes the current practice: "[T]he president seeks to consolidate her empire by increasing the number of loyalists in unruly bureaucratic fiefdoms. The overriding criteria in making these appointments will be loyalty to the president and her program, whose ideological coherence will, of course, depend on the particular president in question."<sup>181</sup> Indeed, while for many decades "a so-called rule of reason" has applied regarding political clearance of career jobs,<sup>182</sup> recent reports concerning hiring practices in the Department of Justice during the current administration suggest that even this norm has come under pressure as well.<sup>183</sup> Political appointees—them-

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<sup>178</sup> See LIGHT, *supra* note 22, at 56.

<sup>179</sup> *Id.* at 56–57.

<sup>180</sup> LEWIS, *supra* note 141 (manuscript at Ch. 2, 22) (citation omitted).

<sup>181</sup> Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 700 (2000).

<sup>182</sup> HECLC, *supra* note 156, at 52.

<sup>183</sup> See, e.g., Dan Eggen, *Justice Dept. Expands Probe to Include Hiring Practices*, WASH. POST, May 31, 2007, at A4; Eric Lipton & David Johnston, *Justice Dept. Announces Inquiry into Its Hiring Practices*, N.Y. TIMES, May 3, 2007, at A18; see also OFFICE OF THE INSPECTOR GEN. & OFFICE OF PROF'L RESPONSIBILITY, U.S. DEP'T OF JUSTICE, AN INVESTIGATION OF ALLEGA-

selves increasingly connected to the White House—have been given the lead role in choosing nonpolitical careerists. And although this practice has provoked controversy, and even been reversed by the most recent Attorney General, it is reflective of the overall trend towards politicization.

### C. Conclusion

Politicization has not made the bureaucracy perfectly responsive to the President's desires. The layering of political appointees may well interfere with the establishment of the flat hierarchy that some public administration scholars contend is necessary for the President to cleanly and directly communicate his policy views to the agencies. Moreover, new appointees—even though politically chosen for their loyalty or ideological affinity—are usually not mere “yes men.” Rather, they are often highly credentialed and talented people; their integrity should not be questioned simply because they are increasingly committed to the President and his agenda. But the contention that politicization only further bureaucratizes the bureaucracy—thereby making it less capable of implementing the President's regulatory visions—still is overdrawn. The layering of political appointments, for all of its downsides from the perspective of a President seeking to gain regulatory control, does help to check the resistance that might come from within the bureaucracy. It increases the likelihood that presidential loyalists will be able to monitor and check a Senate-confirmed departmental head who might be tempted to “freelance.” And it also increases the capacity within the agency to monitor independent actions by the career staff. That is, no doubt, why Presidents seem consistently enamored of this strategy.

A recent anecdote nicely shows how politicization enables a President to influence bureaucratic outputs in ways that centralization might not. *The Washington Post* recently published an extensive series of pieces on the influence of Vice President Cheney in shaping agency decisionmaking. The series focused on, among other things, Cheney's influence on environmental policy, and it highlighted his own direct role in communicating with agency staff about issues of concern to him—and, presumably, of concern to the President. In identifying the key to the Vice President's success in getting agencies to reverse environmental policy positions they had initially settled upon, a midlevel

appointee emphasized politicization rather than centralization. He explained that the Vice President did not tell him how to resolve any particular issue. “[The Vice President’s] genius,” the official said, is that “he builds networks and puts the right people in the right places, and then trusts them to make well-informed decisions that comport with his overall vision.”<sup>184</sup>

#### IV. Responding to Politicization

If the analysis thus far is correct, how should administrative law respond? Surely the answer cannot be found by continuing to debate the propriety of various forms of centralization—whether they involve regulatory review or the directive power. Even if the arguments that those forms of centralization are legally problematic are granted, the bureaucracy still may be transformed through politicization. For supporters of presidential control, therefore, encouragement and support for—even celebration of—the current trend toward politicization might well be in order. But for those worried about the loss of agency independence, the task is different. It entails identifying means of mitigating the impact of presidential efforts to assume greater and greater control over the selection of agency staff. After examining the formidable obstacles that confront political attempts to impose such limits through either new legislative enactments or a shift in the presidential approach to the appointment process, I use the Supreme Court’s recent decision in *Massachusetts v. EPA*<sup>185</sup> to consider two potential judicial responses: (1) “expertise-forcing” judicial review and (2) “experiment-enabling” judicial review. In the course of doing so, I stress the need to distinguish between centralization and politicization in thinking about what methods of mitigation are likely to work, settling upon one that seeks to carve out greater room for decentralized regulatory policy formulation as a counterweight to the policy myopia that politicization threatens.

##### A. Political Responses to Politicization

Congress could, by statute, restrict the number of political SES positions, as well as Schedule C positions. It also could impose more stringent qualification requirements on those political posts that *are* allocated. Further, it could attempt to reduce funding for the White

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<sup>184</sup> Jo Becker & Barton Gellman, *Leaving No Tracks*, WASH. POST, June 27, 2007, at A1. This piece was the final installment of a four-part series entitled, “Angler: The Cheney Vice Presidency,” published June 24–27, 2007.

<sup>185</sup> *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007).

House Office of Personnel to ensure that political appointments that are vested in agency heads are actually filled without substantial White House control. Finally, Congress could be more assertive in competing with the White House for policy control through aggressive oversight at all stages of the regulatory process, including the initial choice of agency personnel.

The recent controversy over the U.S. attorneys firings illustrates the potential influence of even seemingly modest statutory reform. An amended provision of the USA PATRIOT Act<sup>186</sup> that permitted the President to appoint U.S. attorneys without the need for Senate confirmation created a situation that facilitated politicization.<sup>187</sup> By permitting the President to replace lead federal prosecutors without having to return to the Senate to fill the vacant posts, the preexisting power to remove them at will became much more useful. U.S. Attorneys could now be fired and replaced, seemingly without triggering much legislative resistance. Of course, as we now know, the resistance came through oversight, and eventually the legislative alteration of the appointments method was changed so that Senate confirmation became the standard requirement once again.<sup>188</sup> Nonetheless, the controversy does suggest that the way Congress structures the appointments process influences the extent to which the President will attempt and carry out politicization efforts.

There are, however, significant obstacles to instituting legislative changes designed to curtail the President's selection discretion. Congress may be wary of stripping the President of unrestricted appointment authority depending on whether the legislative majority in power is supportive of the President currently in office. And, given the importance of politicization to Presidents,<sup>189</sup> legislation may fail given the veto power. Furthermore, the burrowing-in problem, whereby outgoing Presidents launder political appointees into the upper level of the career civil service, indicates that suspending or curtailing the appointing authority of the next President may be a more

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<sup>186</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 ("USA PATRIOT ACT"), Pub. L. No. 107-56, 115 Stat. 272 (codified in scattered sections of U.S.C.).

<sup>187</sup> See USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, 120 Stat. 246 (to be codified at 28 U.S.C. § 546(c)).

<sup>188</sup> See Preserving United States Attorney Independence Act of 2007, Pub. L. No. 110-34, 121 Stat. 224 (to be codified at 28 U.S.C. § 546(c)).

<sup>189</sup> See Lewis, *supra* note 8, at 6 (noting that all modern Presidents have an incentive to politicize).



consequential decision than Congress is inclined to make.<sup>190</sup> Doing so may only serve to lock in the outgoing President's regulatory vision.

Nor is it easy to solve the problem through statutorily imposed qualifications for officers. Although it might seem that mandating technical expertise or professional credentials could help to limit the President's capacity to select loyalists, the truth is that the professions are increasingly polarized internally along ideological lines. It is by no means clear, therefore, that it is possible to draft qualification restrictions that would constrain the President's choices in any meaningful way. Being "learned in the law"—or learned in any of the other hard or soft social sciences—is hardly a significant constraint given the notoriously sharp methodological/ideological divides that are now common to all of these disciplines. What is more, consider that even the statute adopted in the wake of the Katrina-based controversy over the appointment of Michael Brown as head of the Federal Emergency Management Administration is not obviously limiting.<sup>191</sup> Although the new provision is designed to ensure that the head of such an important agency has the professional experience necessary to ensure competent performance, the new statute is not clearly constraining in fact. Given Brown's own prior service as a general counsel in that agency,<sup>192</sup> he may well have met even the new qualifications.

A new President could return to what is known as "Cabinet government" and disclaim the desire to pursue a politicization strategy. It may even be likely that the next President will take conspicuous steps to back away from what appears to be the hyperpoliticization of recent years. Indeed, some modern Presidents have been singled out for making professional competence their highest priority in selection, among them Lyndon Johnson,<sup>193</sup> a President who can hardly be accused of being ineffective at pulling the levers of government or running the bureaucracy. But the notion that the President should be able to exercise control over the agencies remains a powerful one, and the institutional pressures on the President to politicize that Moe describes have not appreciably abated. The expectation that politicization will cease in any substantial respect because Presidents will

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<sup>190</sup> See LEWIS, *supra* note 141 (manuscript at Ch. 3–4, 8, 15–24, 29–32).

<sup>191</sup> See 6 U.S.C.A. § 313(c)(2)(A), (B) (West 2007) (requiring the FEMA Administrator to have a "demonstrated ability in and knowledge of emergency management and homeland security" and "not less than 5 years of executive leadership and management experience in the public or private sector").

<sup>192</sup> LEWIS, *supra* note 141 (manuscript at Ch. 6, 30).

<sup>193</sup> See WEKO, *supra* note 134, at 31.

eschew such a strategy, therefore, hardly seems like a realistic prediction.

Nor is congressional oversight likely to be an adequate means of checking such executive action. Throughout the period in which politicization has intensified, there have been moments of quite aggressive legislative oversight. Indeed, during this period, two Presidents were seriously threatened with being convicted through the impeachment process. The irony is that, in the very periods when one would expect congressional oversight to have been most intensive—periods marked by a divide between a President of one party and a Congress of another—politicization has seemed to be all the more attractive to Presidents and relatively immune to congressional efforts to check it in any substantial respect. With no prospect of legislative accomplishment in the offing, Presidents seem to have been, if anything, especially intent on asserting greater influence over the one process that does seem to be within their power to control, notwithstanding the slings and arrows that such efforts to gain control over the administrative state may draw.

Political reform of the appointments process is thus not something one should count on in the near term, even if one were convinced that it would be desirable. Achieving meaningful reform is difficult, as reflected in Bruce Ackerman's recent argument that the only way to end the politicization of the bureaucracy is to shift from presidentialism to what he calls "constrained parliamentarianism."<sup>194</sup> Ackerman's basic idea is that, so long as the President is separated from the legislature in the way a presidential system requires, he will inevitably be distrustful of the professional bureaucracy.<sup>195</sup> That is much less the case, Ackerman contends, in a system in which the leading executive figure is by definition in control of the legislative chamber.<sup>196</sup> In such a system, the need to politicize the bureaucracy is much less. Ackerman may be wrong prescriptively in favoring a parliamentary system. He may even be wrong descriptively in tracing the executive's attraction to politicization to the formal constitutional structure rather than to more amorphous attributes of American political and social life.<sup>197</sup> But his analysis at least does offer one sophisticated analyst's assessment of the magnitude of the task that confronts

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<sup>194</sup> Bruce Ackerman, *supra* note 181, at 642–43.

<sup>195</sup> *See id.* at 698–702.

<sup>196</sup> *See id.* at 700.

<sup>197</sup> *Cf. id.* at 690–92, 700–01.

those who would seek to reverse current trends toward politicization at the national level.

*B. Judicial Responses to Politicization*

The substantial obstacles just reviewed underscore the need—for those concerned by politicization—to consider responses that are not dependent upon congressional or presidential action. I focus below on two possible *judicial* responses to politicization. My focus on the role that courts can play in this area is appropriate even though I have argued that Congress may be expected to tolerate presidential politicization for the foreseeable future. The fact that Congress is unlikely to do much to check presidential politicization in the near term hardly reflects the kind of congressional endorsement of a presidential practice that should compel courts to perform their judicial review function in a manner that would facilitate that practice without limit. As is so often the case in administrative law, the indications of congressional intent are simply too difficult to discern to conclude that courts are without the legitimate authority to do here what they have always done—namely, use their power of judicial review to promote the ideal of sound administrative governance that best accords with what they take to be the often hazy indications that are lurking in the relevant legal materials and traditions.

Each of the possible judicial responses I discuss is suggested by the Supreme Court's recent decision in *Massachusetts v. EPA*. The first involves what has recently been termed “expertise-forcing” judicial review,<sup>198</sup> which seeks to check White House influence by forcing federal agencies to bring their scientific expertise to bear on controversial questions. The second involves what I will call “experiment-enabling” judicial review, which seeks to prevent federal agencies from preempting the efforts of state and local regulatory actors to address such controversial regulatory questions on their own. My suggestion is that, if one thinks politicization rather than centralization is the critical means by which Presidents have been gaining control over the bureaucracy, then the latter judicial response is more likely to promote an independent administrative perspective than is the former one. But because this latter approach seeks to use state and local administration as a substitute for the independent federal administrative perspective, it necessarily raises a host of complications about precisely how it represents a meaningful response to a problem that any-

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<sup>198</sup> Freeman & Vermeule, *supra* note 18, at 1–2.

one should care about—complications that I begin to address in the concluding Part.<sup>199</sup>

### 1. Expertise-Forcing Judicial Review

*Massachusetts v. EPA* involved a challenge to the EPA's refusal to initiate a greenhouse gas rulemaking proceeding in response to a petition that it do so.<sup>200</sup> The EPA argued first that it had no legal authority under the Clean Air Act<sup>201</sup> to regulate greenhouse gases, and second, that even if it did, it acted appropriately in declining, as a matter of discretion, to decide whether to exercise such authority.<sup>202</sup> The Court rejected both arguments in a decision that Freeman and Vermeule, in their provocative recent analysis, characterize as “expertise-forcing.”<sup>203</sup>

On this view, the Court was responding to concerns that the current White House had been pressuring environmental agencies to alter their considered scientific judgments—including those relating specifically to global warming.<sup>204</sup> The Court, therefore, sought to require the EPA to “exercise expert judgment free from outside political pressures, even or especially political pressures emanating from the White House.”<sup>205</sup> The Court wanted to “liberate the EPA from these cross-cutting and paralyzing political pressures, both enabling it to bring expertise to bear on the regulatory problems and prodding it to do so.”<sup>206</sup> Indeed, by rejecting the EPA's refusal to decide whether a greenhouse gas rule was scientifically necessary, the Court arguably attempted to force the EPA to face up to a question that it would have to resolve in accord with professional norms operating within the Agency—namely, ones dictated largely by the broader scientific community.

This form of judicial review has two components. The first seeks to check external, White House-driven political influence on the agency, and the second seeks to compel the agency to exercise its expert scientific judgment independently and without regard to its own political inclinations. Of course, to the extent that external White House pressure (i.e., centralization) is the problem, the Court can re-

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<sup>199</sup> See *infra* Part V.

<sup>200</sup> *Massachusetts v. EPA*, 127 S. Ct. 1438, 1446 (2007).

<sup>201</sup> Clean Air Act, 42 U.S.C. § 7604(a)(1) (2000).

<sup>202</sup> *Massachusetts v. EPA*, 127 S. Ct. 1438, 1450 (2007).

<sup>203</sup> Freeman & Vermeule, *supra* note 18, at 1–2.

<sup>204</sup> *Id.* at 1–4.

<sup>205</sup> *Id.* at 1–2.

<sup>206</sup> *Id.* at 10–11.

spond by invalidating agency actions or rejecting agency justifications that seem to depend on it. Insofar as an agency relies on a directive of the kind Dean Kagan identifies, or the record demonstrates White House pressure, for example, a court may conclude that the agency justification is arbitrary and capricious, or otherwise unlawful. But in *Massachusetts v. EPA*, the Court did seem to go much further, appearing to engage in a form of review that would root out even more subtle indicia of White House influence and, perhaps, even preclude the agency's own political leadership from using something other than professional expertise to determine what the agency would do. In this way, it might seem to be a form of review well-suited to attack both centralization and politicization.

The Court first denied the EPA *Chevron* deference on all close questions of law, thereby rejecting the Agency's twin claims that the Clean Air Act's text neither clearly (1) covers greenhouse gases nor (2) requires the EPA to justify its inaction on the basis of the criteria that the statute sets forth for structuring the actual issuance of rules.<sup>207</sup> Because the Court did not provide particularly persuasive reasons for concluding that deference was inappropriate, it is quite plausible to think that the Court's statutory analysis was motivated by a desire to check perceived political pressure by giving the EPA no choice but to address a scientific question that the Bush Administration clearly thought would be politically advantageous to avoid making. Consistent with this view, the Court deemed it arbitrary when the EPA relied on White House policy pronouncements in its own statement of reasons for its refusal to initiate rulemaking proceedings.<sup>208</sup> In this respect, the Court seemed to reaffirm its rejection in *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*<sup>209</sup> of then-Justice Rehnquist's concurring opinion in that case, in which he had suggested that an agency could resolve discretionary regulatory choices by appealing to the general regulatory philosophy of the President then in office.<sup>210</sup> In this way, too, then, the Court seemed to be trying to create something of a wall between agency judgments and White House preferences. Finally, the Court gestured toward a form of hard-look review, in a move that seemed intended to indicate that boilerplate, neutral-sounding justifications would be

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<sup>207</sup> *Massachusetts v. EPA*, 127 S. Ct. at 1459.

<sup>208</sup> *Id.* at 1462–63.

<sup>209</sup> *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

<sup>210</sup> *Id.* at 59 (Rehnquist, J., concurring in part and dissenting in part).

scrutinized intensively on remand so as to ensure that they were not mere political statements in disguise.<sup>211</sup>

But insofar as politicization rather than centralization explains the EPA's behavior, it is not clear that expertise-forcing judicial review can preserve an independent administrative voice. To be sure, the denial of deference, rejection of political reasons, and gesture toward hard-look review may be appropriate responses to agency politicization in some cases. When an agency is seeking to change the regulatory status quo on the basis of little more than its own desire to advance White House policy, it may well be appropriate for judges to use these very tools to invalidate agency action. In that way, the Court can ensure that changes to regulatory policy are accomplished only through a decisionmaking process that bears the attributes associated with a decisional process that is recognizably administrative in orientation. But, it is important to see that when the Court uses any of these methods to strike down agency action that changes the status quo—as it did in *State Farm*<sup>212</sup>—it does not actually force an agency to bring its expertise to bear. Rather, it simply denies the agency the power to make new policy unless it demonstrates that it has done so on the basis of a reasoned analysis.

This review process, of course, is a potentially iterative one. An agency may get the judicial message and recast its position in language that sounds sufficiently administrative and apolitical to survive the next round of judicial scrutiny. But even then, it seems a mistake to conclude that the Court has forced the agency to bring its expertise to bear. Equally likely, it has simply forced the agency to describe its political judgment in terms that sound neutral and in conformity with administrative norms. It is surely possible that, over time, these rhetorical requirements will have substantive effect: the way we speak can affect the way we think. In this respect, the Court can help to promote an administrative culture by requiring that decisions be justified in certain ways. Over time, this requirement may well lead agencies to resist political influence from the outside. Political influence may come to seem unlawful or illegitimate to the relevant players within the agency itself in a way that it might not if the Court were to follow then-Justice Rehnquist's concurrence in *State Farm* and accept overtly political justifications for agency action so long as they con-

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<sup>211</sup> See *Massachusetts v. EPA*, 127 S. Ct. at 1462–63.

<sup>212</sup> *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 46–57 (holding that the National Highway Traffic Safety Administration's decision to revoke passive restraint requirement lacked reasoned analysis and thus was struck down as arbitrary and capricious).

form to statutory bounds and satisfy the barest form of arbitrary and capricious review.

Yet, such a form of review is unlikely to compel an agency to bring to bear its expertise in a way that will be likely to produce a change in the regulatory status quo that is at odds with the preferences of the White House. The agency in such cases is more likely to refrain from acting than to pursue a course opposite of the one it initially favored because its own expert judgment convinces it that it must. That is not to say that such cases will never occur; it is to say only that they are unlikely, particularly when the matter is of significant interest to the public. And there is all the more reason to doubt that agencies will so act when their political leadership has been chosen precisely to ensure that such major deviations from the White House view do not occur.

For this reason, a case like *Massachusetts v. EPA* presents a purer test of the judicial attempt to force agencies to act as independent experts than occurs when the Court simply deploys the expertise-forcing mode of review to invalidate a proposed agency rule. In a case that challenges an agency's refusal to initiate a rulemaking, the Court can thwart the agency's politically based departure from the administrative mode of decisionmaking only if it can "force" the agency to act. Inaction, after all, *maintains the status quo*. And yet, as I have suggested, it is extremely difficult for courts to force an agency to take new regulatory action that conflicts with what the White House wants when the agency itself wants to advance the White House's preferences. When an agency has decided to cast its lot with the White House—even committed itself to the idea that it should do just that—it is not clear how it can be "liberate[d]"<sup>213</sup> from White House pressure. To be sure, the civil servants within the agency may well come to a different view than the White House if authorized to express their own independent judgment, but agencies are by design ultimately controlled by political heads who speak for the agency. Indeed, a variety of administrative law doctrines requires that the agency speak through them. If the perspective of the political leadership within the agency thus is fully merged with that of the White House, freeing the agency to reach its own judgment will not necessarily yield an outcome much different from the one that the White House would seek to obtain through centralization.

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<sup>213</sup> Freeman & Vermeule, *supra* note 18, at 10–11.

And apparently, as it turns out, the EPA's political leadership did not actually consider itself to have been overwhelmed by external political influence from the President and his White House aides. However resistant the EPA's career staff may have been, the EPA's political leadership seemed intent on implementing the President's own announced policy with respect to global warming. From whence came the legal theory that the EPA lacked the authority to regulate greenhouse gases? From a formal legal opinion of the EPA's own general counsel, who reversed his predecessor's opinion—espoused under the Clinton Administration—that carbon dioxide emissions were within the scope of the EPA's regulatory authority.<sup>214</sup> And assuming that the EPA did have legal authority, what reasons did it give for declining to entertain the petition? Reasons that the Agency chose to pluck straight from the White House's own prior announcements.<sup>215</sup>

There is no evidence that the EPA's political leadership toed the White House line because OIRA or anyone else in the White House had required it do so. Nor is there any indication that the White House had ordered such a result through directives. There is, however, evidence of a quite-thorough politicization effort. Indeed, by the time the Court decided *Massachusetts v. EPA*, the White House had replaced an earlier political head of the EPA who had been somewhat resistant to President Bush's global warming policy.<sup>216</sup> And although the new political leader was himself a former career civil servant,<sup>217</sup> in all likelihood the White House was confident that he would not prove to be an obstacle to the successful implementation of its global warming strategy—quite possibly because, on the merits of the climate change debate, he sincerely agreed with the Bush Administration's views.

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<sup>214</sup> See *Massachusetts v. EPA*, 127 S. Ct. at 1449–50.

<sup>215</sup> In explaining why it “believes that setting GHG emission standards for motor vehicles is not appropriate at this time,” it relied primarily on the fact that “President Bush has established a comprehensive global climate change policy” and that “[t]he international nature of global climate change also has implications for foreign policy, which the President directs.” Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52922, 52925 (denied Sept. 8, 2003).

<sup>216</sup> See Becker & Gellman, *supra* note 184 (“It was Cheney’s insistence on easing air pollution controls, not the personal reasons she cited at the time, that led Christine Todd Whitman to resign as administrator of the Environmental Protection Agency, she said in an interview that provides the most detailed account so far of her departure.”).

<sup>217</sup> See Shankar Vedantam, *Scientist Named to Head the EPA*, WASH. POST, Mar. 5, 2005, at A1. Prior to his appointment as EPA Administrator, Stephen L. Johnson had worked at the EPA for twenty-four years. *Id.*



Thus, if the Court's "enterprise [was] expertise-forcing,"<sup>218</sup> that is, if the Court intended to "clear away legal obstacles and political pressures in order to encourage or force the EPA to make an expert first-order judgment about greenhouse gases,"<sup>219</sup> its decision was premised on a misdiagnosis. There was no inner administrative child to be set free. Even if the decision in *Massachusetts v. EPA* sent a clear signal that the EPA was to decide this matter on its own, it did little to prevent the EPA from exercising its own judgment in a manner that would please the White House.

Not surprisingly, the EPA still has not formally rejected the petition for rulemaking nor acted upon it.<sup>220</sup> The EPA initially stated that it would "prepare by Dec. 31 a national proposal on how greenhouse gases from vehicles should be regulated,"<sup>221</sup> but in the interim, the White House successfully lobbied for and subsequently signed into law a new energy bill.<sup>222</sup> In the wake of that legislative development, a proposed EPA greenhouse gas standard that had "cleared all EPA internal reviews and was forwarded to the Department of Transportation" for further review stalled, and it became "unclear, when, if ever, such a proposed regulation [would] be issued."<sup>223</sup> Indeed, the head of the EPA had reportedly "ordered staff to stop work on the federal greenhouse gas proposal," and the EPA as this goes to press is reviewing whether it still has "the authority to set [its] own greenhouse gas standards for vehicles."<sup>224</sup> On July 11, it issued an Advanced Notice of Proposed Rulemaking on the issue that laid out various competing concerns, noting "it is impossible to simultaneously address all the agencies' issues and respond to the agency's legal obligations in a timely manner."<sup>225</sup> The EPA gave the public 120 days to comment.

Perhaps the Court could have anticipated this predictable response by taking an even more aggressive stance: ordering the Agency to resolve the underlying scientific question within, say, ninety days of

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<sup>218</sup> Freeman & Vermeule, *supra* note 18, at 20.

<sup>219</sup> *Id.*

<sup>220</sup> In March 2008, EPA Administrator Johnson signaled that the Agency would seek public comment on a proposed rulemaking, thereby further delaying its decision. Ian Talley, *EPA Delays CO<sub>2</sub> Ruling, Angering Bush Critics*, WALL ST. J., Mar. 28, 2008, at A6.

<sup>221</sup> Janet Wilson, *EPA Chief Is Said to Have Ignored Staff*, L.A. TIMES, Dec. 21, 2007, at A30.

<sup>222</sup> *See id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *See* U.S. EPA, Advance Notice of Proposed Rulemaking: Regulating Greenhouse Gas Emissions Under the Clean Air Act, EPA-HQ-OAR-2008-0318, <http://www.epa.gov/climatechange/anpr.html> (last visited July 22, 2008).

its judgment. But it is not surprising that the Court refrained from doing so. Not only are judicially imposed timelines notoriously difficult to enforce, but courts are reluctant to intrude so deeply into the administrative process. Even if courts are willing to check White House directives and other means by which the President directly interferes with agency autonomy, they are reluctant to deprive agencies of discretion in deciding whether to regulate.<sup>226</sup> And that inevitably makes it possible for a presidential strategy of politicization to bear fruit. Although the decision in *Massachusetts v. EPA* thus all but exhausts the strategies that courts have devised to compel agencies to act independently, none of those strategies appears adequate to solve the problem they seek to address.

Worse still is that some of these strategies seem affirmatively problematic given their likely inefficacy. After all, there is a risk that, when courts deny *Chevron* deference, they will supply a statutory meaning that is itself problematic. *Massachusetts v. EPA* may itself be such a case. It seems wrong to suggest, as the Court's decision does, that the statutory criteria for *issuing* rules must be construed to provide the relevant criteria on which an agency may base its justification for *denying* rulemaking petitions.<sup>227</sup> Such an interpretation would seem to preclude agencies from relying on a whole host of resource prioritization questions that would seem to be quite legitimate but that are rarely set forth in the statutory provisions defining the bounds of rulemaking authority. Similarly, intensive judicial efforts to screen out political justifications for agency judgments raise their own concerns. They may do little more than legitimate the very politicization that is occurring by encouraging agency officials to speak in ways that are not fully candid.<sup>228</sup> And although hard-look review can mitigate this concern, the well-known ossification that such intensive judicial review may cause suggests the need to be wary of this solution.<sup>229</sup> Here, again, the decision in *Massachusetts v. EPA* highlights the concern by seeming to invite ossification even at the *prerulemaking* stage.

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<sup>226</sup> See, e.g., *Heckler v. Chaney*, 470 U.S. 821, 837–38 (1985) (holding agency decision not to initiate enforcement proceeding presumptively unreviewable). The Administrative Procedure Act authorizes judicial review of agency actions with certain exceptions, one of which is review of agency action that is “committed to agency discretion by law.” 5 U.S.C. § 701(a)(2) (2000).

<sup>227</sup> See *Massachusetts v. EPA*, 127 S. Ct. 1438, 1462–63 (2007).

<sup>228</sup> See CHRISTOPHER F. EDLEY, JR., *ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY* 59–60 (1990).

<sup>229</sup> See Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 *ADMIN. L. REV.* 59, 65 (1995).

## 2. *Experiment-Enabling Judicial Review*

Fortunately, the decision in *Massachusetts v. EPA* does more than highlight the difficulty (and hazards) that courts confront in trying to force a politicized agency to draw on its expertise. It also suggests an alternative means by which judges may mitigate the effects of White House politicization of the bureaucracy.<sup>230</sup> But this approach does not attempt to force the federal bureaucracy to act nonpolitically in issuing new regulations. Instead, it limits the politicized agency's authority to check the actions of state and local regulators, thereby enabling state experimentation to serve as a substitute for the missing *federal administrative voice*.

In *Massachusetts v. EPA*, the Court began by addressing whether the state petitioner had standing.<sup>231</sup> As already noted, restrictions on standing have long been central to the unitary executive theory.<sup>232</sup> Liberal standing rules threaten to give actors not part of the executive branch—and thus not subject to presidential control—the authority to challenge and even compel administrative judgments. In this way, the Court's holding that the State of Massachusetts did have standing to challenge the EPA's refusal to decide whether to initiate a rulemaking proceeding was consistent with what seemed to be the Court's general concern that political, rather than professional, considerations were driving the Agency. But, in suggesting that states, in particular, are proper plaintiffs, the Court also was acknowledging that there are other governmental actors who have a stake in the regulatory policy at issue.<sup>233</sup> Thus, while one could read the decision as a holding that liberalizes standing as a general matter, one might also think that it mattered to the Court that the actor suing was not a private party but a potential regulator—a competitor, of sorts, for regulatory policymaking authority. In this respect, one might think of Massachusetts and the various other states and localities allied with it as stand-ins for the independent administrative voice that the Court was seeking to force out into the open.

Of course, the Court would accomplish little if it sought only to empower states to sue federal agencies for failing to act. The problems described above would make it unlikely that any such suits would succeed in forcing the EPA to bring its expertise to bear on a problem. So perhaps we should take the Court's pro-state standing

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<sup>230</sup> *Massachusetts v. EPA*, 127 S. Ct. 1438, 1452–55 (2007).

<sup>231</sup> *Id.* at 1452–58.

<sup>232</sup> See *supra* note 58 and accompanying text.

<sup>233</sup> See *Massachusetts v. EPA*, 127 S. Ct. at 1454–55.

ruling as a reason to explore a broader possibility, namely, that states might actually substitute for the administrative voice with which the politicized agency is refusing to speak. And that very issue is now squarely presented.

In the wake of the Court's decision, and the EPA's refusal to initiate rulemaking proceedings, California and other states asked the EPA to respond to their requests for a waiver from provisions of the Clean Air Act that would preempt the greenhouse gas regulations that those states had adopted. The Act permits other states to obtain the waiver so long as they adopt California's exact rules, and it provides that the EPA may deny a waiver only if it concludes the California regulation is arbitrary and capricious, weaker than federal regulations, or if there is no extraordinary or compelling need for the rule.<sup>234</sup>

The first test provides a weak ground for denying the state request, given the plausibility of the states having reached a reasoned decision favoring emissions restrictions to reduce greenhouse gases. Indeed, the EPA would be hard-pressed to argue otherwise without resolving the very scientific question that, it appears, it is politically committed to refusing to resolve. Nor does the second test provide a solid basis for denying the waiver, for the EPA has issued no greenhouse gas rules at all. That leaves open only the question whether there is an "extraordinary or compelling" need for the state emissions rules.

As it happens, the EPA has weighed in by denying the waiver requests.<sup>235</sup> It concluded that California cannot satisfy the "extraordinary or compelling need" test because the state's waiver request refers only to *local* (not global) problems and that its proposed rules would undermine the uniformity now promised by the recently enacted energy bill.<sup>236</sup> In reaching this conclusion, it appears that the political leadership within the EPA rejected the advice of the career staff.<sup>237</sup>

If, in reviewing the EPA's decision to deny California's waiver request, the Court were to perform the same expertise-forcing review that it applied in *Massachusetts v. EPA*, the EPA likely would lose. First, the EPA would not receive *Chevron* deference in arguing that the "extraordinary or compelling need" test pertains only to *local*

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<sup>234</sup> See 42 U.S.C. § 7543(b)(1)(A)–(C) (2000).

<sup>235</sup> Letter from Stephen L. Johnson, EPA Adm'r, to Arnold Schwarzenegger, Governor of Cal. (Dec. 19, 2007), available at <http://www.epa.gov/otaq/climate/20071219-slj.pdf>.

<sup>236</sup> *Id.*

<sup>237</sup> Wilson, *supra* note 221.

problems and thus necessarily excludes *global* warming. Second, the EPA could not successfully justify its decision by appealing to the need to ensure that Agency action does not interfere with general White House global warming policy, as such an argument seems akin to the political justifications rejected out of hand in *Massachusetts v. EPA*. Finally, the EPA would be required to provide a fairly intensive agency justification for its conclusion that uniformity is imperative—something it might find difficult to do, given that the EPA routinely granted California’s waiver requests in the past.<sup>238</sup>

Notice that in applying such intensive, nondeferential scrutiny here, the Court would be much more likely to succeed in liberating a new administrative voice that is uninfluenced by the White House. Although it may be difficult to force the EPA to bring its expertise to bear in a timely fashion, the effect of rejecting the EPA’s attempted preemption would be to enable the regulations crafted by the California Air Resources Board (“CARB”), which, it should be noted, is now chaired by a former midlevel EPA official, to take effect in all states that have adopted them. In other words, if what the Court is seeking to do is to give life to an administrative perspective that is uninfluenced by White House political pressure, then restricting EPA preemption may have just that effect.

A similar analysis is applicable in the related case of *Central Valley Chrysler-Jeep, Inc. v. Goldstene*.<sup>239</sup> That case concerned whether the CARB rules were preempted by provisions of the Energy Policy and Conservation Act of 1975, which contains sweeping bars to state and local rules that relate to fuel economy standards.<sup>240</sup> Here, too, were the Court to deny *Chevron* deference, reject political justifications, and apply hard-look review, the relevant federal agency, here the National Highway Traffic Safety Administration, might not be forced to resolve the scientific question scientifically. But an administrative perspective would be liberated—namely, that reflected in the CARB rules. Or, put otherwise, the federal agency could succeed only in achieving its desired outcome—precluding enforcement of the state rules—by rendering a decision that would satisfy expertise-forcing review under *Massachusetts v. EPA*.

One can extend this analysis beyond the confines of global warming and environmental law. Consider what has happened in the area

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<sup>238</sup> Freeman & Vermeule, *supra* note 18, at 36 n.114.

<sup>239</sup> *Cent. Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151 (E.D. Cal. 2007).

<sup>240</sup> *Id.* at 1154, 1165–70.

of subprime mortgage regulation.<sup>241</sup> Here, too, the question is not whether the federal agency can be forced to bring its expertise to bear on a subject. Rather, it is whether, given statutory ambiguity about Congress's desire to oust state regulators from the field, the same impulses that cause courts to deploy a mode of review designed to promote an independent administrative judgment should cause them also to be skeptical of federal agency claims of preemptive authority. Put that way, the answer seems straightforward. Unclear to me is why the suspicions—so evident in *Massachusetts v. EPA*—about whether agencies are actually bringing their expertise to bear should be overlooked when these same agencies are affirmatively attempting to prohibit other regulators from bringing theirs. In this regard, I am suggesting something different from a general presumption against preemption or a refusal to grant *Chevron* deference on all preemption questions. I am arguing that the expertise-forcing mode of judicial review—with its skeptical approach to agency reasoning and its *State Farm*-like aggressiveness in interrogating more than simply legal interpretations—be used to preclude federal agencies from preempting state and local regulators without first demonstrating to the courts that such preemption decisions are not themselves strongly influenced by political considerations. Politics, I have suggested, is pervasive in administrative regulation, but that is why attempts by national regulators to lock out alternative regulatory voices should be of particular concern to those who see virtue in the administrative process.<sup>242</sup>

### V. Conclusion

I have argued that the Court achieved little in dispensing with deference in *Massachusetts v. EPA*, and, further, that it may have even

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<sup>241</sup> See *Watters v. Wachovia Bank, N.A.*, 127 S. Ct. 1559, 1564–69 (2007) (holding state licensing, reporting, and visitorial regimes governing bank's mortgage business preempted by federal law); see also Baher Azmy, *Squaring the Predatory Lending Circle*, 57 FLA. L. REV. 295, 382–90 (2005).

<sup>242</sup> I leave to one side the various instances in which federal agencies seek to preempt state tort law through regulations that do not establish a directly conflicting federal standard. These cases are obviously important, and they have been the target of most of the literature on regulatory preemption. See, e.g., Mary J. Davis, *The Battle over Implied Preemption: Products Liability and the FDA*, 48 B.C. L. REV. 1089, 1134–54 (2007) (analyzing implied conflict preemption in the context of federal prescription drug labeling and state tort claims); Paul E. McGreal, *Some Rice with Your Chevron?: Presumption and Deference in Regulatory Preemption*, 45 CASE W. RES. L. REV. 823, 832–34 (1995); Nina A. Mendelson, *Chevron and Preemption*, 102 MICH. L. REV. 737, 754 n.67 (2004); Catherine M. Sharkey, *Preemption by Preamble: Federal Agencies and the Federalization of Tort Law*, 56 DEPAUL L. REV. 227, 227 (2007). But it is not clear that state tort law provides a competing administrative alternative at the state and local level given the distinct features of common law rules.

erred in doing so, given its failure to mitigate politicization in any meaningful respect. It may have emboldened dissenting voices within federal agencies, but it did little to alter the ultimate decisions of the political leadership of the EPA. But I have also suggested that the Court would succeed in providing such a check by departing from the deferential mode in reviewing federal agency attempts to preempt state and local regulators. If the goal is to ensure that regulatory policy in the United States is to be something more than a reflection of the White House view—a proposition seemingly embraced by all those troubled by centralization—then federalism may offer the most viable solution. That is not to say that federal law in general should be construed to avoid preemption. It is rather to contend that, in light of the politicization of the federal bureaucracy, agency assertions of regulatory preemption should be viewed with the same type of skepticism that is so evident in the Court's analysis of the EPA's refusal to initiate a rulemaking proceeding on limiting the emission of greenhouse gases. Indeed, my contention is that such judicial skepticism is, if anything, much more appropriately deployed in this context than in one that seeks only to force a federal agency to take action that, for political reasons, it seems determined not to take.

This way of arguing against agency assertions of regulatory preemption is not rooted in respect for state and local autonomy in the way that arguments against regulatory preemption often are.<sup>243</sup> It is animated instead by the concerns I have raised about the merger in regulatory outlook between federal agencies and the White House. Of course, one might argue in response that, given the risks of parochialism, federal actors are necessarily better positioned to make regulatory policy than their counterparts in state and local governments. But the decision to permit federal agencies to oust state and local regulators, I am suggesting, must be seen within the context of the larger concerns that have been raised about increasing White House influence over federal bureaucratic decisionmaking. This, then, is less a defense of state autonomy than of the open-mindedness and experimentation that the creation of a federal administrative system—a system that celebrated norms of expertise and independence and took pride in a professional policymaking culture that was to some important extent autonomous of control by the political branches—was intended to promote.

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<sup>243</sup> See Mendelson, *supra* note 242, at 737–38; see also Brief for Center for State Enforcement of Antitrust & Consumer Protection Laws, Inc. as Amicus Curiae Supporting Petitioner at 11, *Watters*, 127 S. Ct. 1559 (No. 05-1342).

The plain fact is that there is great diversity across the nation as to which policy responses best meet some of the most challenging issues facing the nation. And by no means do these policy divides clearly run along partisan political lines. Among the states pursuing greenhouse gas initiatives, for example, are a number led by Republican governors.<sup>244</sup> And among those skeptical of such solutions are some Democratic congressmen.<sup>245</sup> There is a great deal of science on the issue of global warming, obviously. But the fact that there is a scientific consensus on the role that human activity plays in causing climate change<sup>246</sup> hardly answers the policy question of what should be done in response. Thus, an embrace of scientific expertise alone cannot resolve the hardest policy questions in this area any more than is usually the case. As to what the government should do, there is plainly wide disagreement, and it seems a stretch to say that Congress has clearly weighed in on the issue in any clear respect. The Clean Air Act was passed at a time when this issue was not foremost on the minds of legislators. Even the Clinton Administration did not contend the relevant statutory provisions compelled it to pass greenhouse gas rules. The Clinton Administration argued only that it had the authority to construe the statutory terms to permit the administration to pass such rules. In such circumstances, it seems problematic to permit a federal administrative process that has been politicized in order to impose a single-minded regulatory vision to shut down alternative perspectives.

Perhaps the best way to make the point is by way of an analogy that comes from the literature on urban politics. Nearly two decades ago, Clarence Stone usefully explained that the fundamental question in city politics is not who gets to exercise power over whom but whether anyone can coalesce the power needed to do anything.<sup>247</sup> Given the fragmented nature of city politics, Stone argued, it was inevitable that governing coalitions—what he called regimes—would

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<sup>244</sup> See, e.g., Felicity Barringer, *E.P.A. Ruling Puts California in a Bind*, N.Y. TIMES, Dec. 21, 2007, at A37 (discussing how California, led by Republican Governor Arnold Schwarzenegger, attempted to implement strict air quality standards for motorists).

<sup>245</sup> See, e.g., Danny Hakim, *Ideas & Trends: Detroit and California Rev Their Engines over Emissions*, N.Y. TIMES, July 28, 2002, at E3 (citing Representative John D. Dingell, a Democrat from Michigan, as one of several midwestern Democrats who oppose strict greenhouse gas emission legislation).

<sup>246</sup> Am. Assoc. for the Advancement of Science, AAAS Board Statement on Climate Change (Dec. 9, 2006), available at [http://www.aaas.org/news/press\\_room/climate\\_change/mtg\\_200702/aaas\\_climate\\_statement.pdf](http://www.aaas.org/news/press_room/climate_change/mtg_200702/aaas_climate_statement.pdf) (reflecting “scientific consensus” of Intergovernmental Panel on Climate Change and the Joint National Academies of Science).

<sup>247</sup> CLARENCE N. STONE, *REGIME POLITICS: GOVERNING ATLANTA, 1946–1988*, at 6 (1989).



form and achieve dominance over policymaking within the city if they could develop and implement a coherent policy.<sup>248</sup> But, Stone noted, these regimes posed a significant concern. Their very success at coalescing power might make them myopic and narrow-minded.<sup>249</sup> They would not know enough to see beyond their own horizons, and they would be so dominant that alternative viewpoints would not be fairly considered and examined. In the process, policy options that might be good for the city—even for members of the regime itself—would never get their due.<sup>250</sup> The institutional design challenge for city politics, then, is not to find ways of precluding regimes from forming; that would only promote fragmentation and thus frustrate cities' power to do much of anything. The challenge is to find a way to inject enough multiple voices into the decisional process so that the regime can learn over time.

A similar analysis seems applicable to the national regulatory process. In the current national regulatory system, who can muster the energy needed to make a decision and implement it? As Dean Kagan and others have convincingly argued, it is increasingly the President who can do this. The President is the regime that Stone talked about. The President overcomes the powerlessness brought about by legislative gridlock, divided government, ossified rulemaking structures, and a fragmented bureaucracy. He does so by taking control over the national administrative process. He gets things done. He brings coherence where none existed before. But if he succeeds, as it appears he has been doing of late, then what of social learning? What of alternative regulatory approaches? What then of the long view?

The concern reflected in such questions underlies the continuing power of the autonomous administrative ideal. It is therefore a concern that lies at the heart of what makes increased centralization and politicization so potentially troubling. These developments, I am suggesting, have made the federal agencies increasingly ill-suited to perform their customary role of providing a mechanism for social learning. That is not because Presidents have hatched nefarious plots to make the agencies their own so much as it is because a powerful institutional logic has increasingly made the federal bureaucracy a fully committed member of the White House regime. To be sure, there are great advantages to such a regime developing, and there are great risks in breaking it up. But given this reality, we should, with

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<sup>248</sup> *Id.* at 219.

<sup>249</sup> *See id.* at 219, 241–42.

<sup>250</sup> *See id.* at 241–42.

Stone, be looking for ways to ensure that alternative voices are brought into the mix nonetheless. Constraining the White House regulatory regime's capacity to oust state and city governments from supplying those voices, it seems to me, is our best hope at the present moment for doing just that.